

Regula Placitandi.

A
COLLECTION
O F
S p e c i a l R u l e s
F O R
P L E A D I N G ,
F R O M
The Declaration to the Issue,

In Actions Real, Personal, and Mixt ;
with the Distinction of Words to be used
therein, or refused.

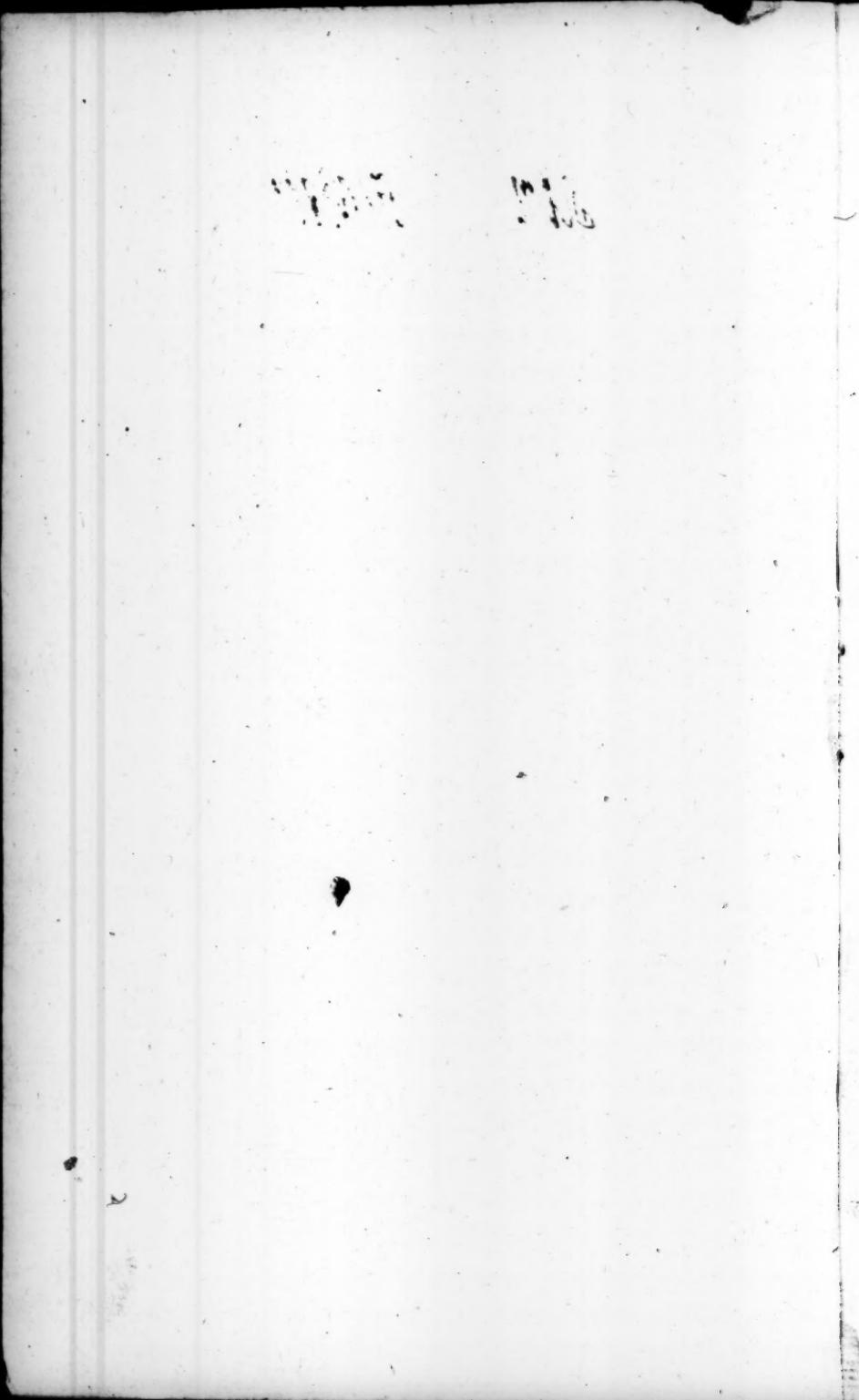
Also Directions for Laying of Actions, of the Time
for bringing them, and of the Persons to bring the same.

Together with some Remarks and Observations
touching Averments, Notice, Request or Demand, Justifications,
Innuendo's, Protestando, Traverse, Averment, Double Pleas,
Abatements, Demurrs, Trials, Verdicts, Judgments, Writs of
Error, Estoppels and Conclusions.

*With divers Precedents, Illustrating and Explaining the same :
Very useful and necessary for Clerks, Attorneys, Solicitors, &c.*

The Second Edition, Corrected.

LONDON : Printed by the Assigns of R. and E. Atkyns, Esquires ;
for Thomas Bassett at the George by St. Dunstans Church,
and Thomas Weaver at the Hand and Star betwixt the
two Temple Gates, by Temple-Bar. M DC XCIV.



Regula Placitandi.

With A Figure
COLLECTION
O F
Special Rules
F O R
PLEADING,
F R O M

The Declaration to the Issue,

In Actions Real, Personal, and Mixt ;
with the Distinction of Words to be used
therein, or refused.

Also Directions for Laying of Actions, of the Time
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Radcliffe Trustees

TO THE
READER.

IT was the Opinion of *Littleton*, That
to have the Science of good Pleading, in
Actions Real and Personal, is one of the
most Honourable and Laudable Things in our
Law: And therefore he Counsels us espe-
cially to employ our Courage and Care to
Learn it.

'Tis true indeed, That the Publick Books
of Pleading are very plentiful; yet there is
a great want of some good Directions to
understand them, so as to apply them to
our own and the Publick Use, which is not
a little concern'd therein; the Thoughts
wheteof first gave Life to these my Endea-
vours.

To the Reader.

Though I would not be thought so guilty of vain Ostentation, as to believe that my Abilities can perform any thing in this Art, like to what may be done by our Grand Clerks and Lawyers, who are possessed of the Rich Grounds and Treasure thereof. However, when I considered, That no Man hath yet Written particularly concerning this Subject, and of what great Importance the Knowledge thereof (in part) is, to those who are yet to Learn it; I concluded, That as this Treatise will be very useful to the latter; so it will (I hope) receive a favourable Construction from the former.

And this I desire of all, That if any thing be superfluous or placed amiss, they will either Correct and Amend it, or favourably Connive at it: Since,
Braff.lib.1.
fo. 1. *To do all Things well, and nothing amiss, is rather a thing Divine, than Human.*

THE

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REGULA

REGULA PLACITANDI.

C H A P. I.

Of Pleas, &c.

TH E word P L E A (*Placitum*) Definition of the word Plea
is said to come of the French *Ploid*, i. e. *Lis*, (*Controversia*) Cowel's Inst. tit. Plea.
and signifieth in our Common Law,
That which either Party alledgedeth for
himself in Court.

Co. Lit. fo. 303. says, They are called
Placita a placendo, quia omnibus placent.

Pleas are also divided into them of
the Crown, and Common.

Those of the Crown, be all Suits in Pleas of the Crown.
the Kings Name against Offences com-
mitted against his Crown and Dignity,
or against his Crown and Peace; as
Treasons, Felonies, and Misprisions of
either; Mayhem, &c.

B

Com-

Pleas, how di-
vided.

Crown.

Stanf pl. Cox.

cap. 1.

Smith de Re-

pub. Ang. 1.2.

6. 9.

Of Pleas, &c.

Common Pleas.
Cowell's Int. ut
supr.

Common Pleas, be those that be held between Common Persons. Yet by the former definitions these must comprise all other, tho' the King be a Party.

Pleadings in
their large
sense.

But Pleadings in their large and proper sense, are said to signifie all the Sayings of the parties to Suits or Actions, either real, personal, or mixt, next after the Count or Declaration.

And because the Count precedes the Pleadings, it may not here be from the purpose to observe some things concerning it.

Of the Count or Declaration.

Declaration,
what.

It is the shewing in writing of the Grief or Complaint of the Demandant or Plaintiff, against the Tenant or Defendant, wherein he supposeth to have received wrong.

Count, what.

It is most properly called a Count, when 'tis in a Real Action.

And in a Personal Action, 'tis rather called a Declaration. F.N.B. 16. a. 60. d.

*Declaration
and Count
taken one for
the other.*

Yet they are sometimes confounded,
 as
 | Count in Debt. Kitch. fo. 281.
 | Count or Declaration, Pl. Coron.
 | in Appeal. fol. 78.
 | Count in Trespass. Briton. Cb. 26.
 | Count in an Action
 | of Trespass upon the Case for Slander. Kitch. fo. 252.
 See

Of Pleas, &c.

3

See Cowel's Interp. Tit. Count.

See also Stat. 36. Edw. 3. cap. 15. where
'tis said:

By the Ancient Terms and Forms of Declarations no man shall be prejudiced, so that the matter of the Action be fully shewed in the Declaration, and in the Writ. Vid. New Terms of the Law.

By which it appears that they are indifferently used.

However these things are to be observed concerning either.

First, For the most part it is and must be more spacious than the Writ, The Parts of the Declaration. (* unless in *Audita Querela*, where the Count and Writ by Common Practice are all one;) for it must contain divers things.

- As {
1. Who complaineth, and against whom.
2. For what Matter.
3. How, and in what manner the Action grew.
4. The time and place the Wrong was done.
5. The Damage sustained by the Wrong done.

Vide Finch Ley 356. Co. Lit. 17.

Secondly, It must be clear, true and certain, because 'tis the Foundation of the Suit, and impeacheth the Defendant,

Other Requisites.
Certainty.
Vide P. 156.

Of Pleas, &c.

dant, and is that whereto he must answer, and upon which the Court must give Judgment.

Yet if the Counts, Replications, and other Pleadings of the Plaintiff (which is to convince the Defendant) be to a certain intent in general*, it may suffice; and if the Barr, (which is to defend and excuse the party Defendant) be sufficient to a Common intent, 'tis said to be enough, *Plow. 121, 122. Co. Lit. 303. Co. Rep. 5. 120.*

*Note, *Estoppels*
must be to a
certain intent
in every parti-
cular. Co. 5.
120. *Lob's*
Case

A Declaration must be certain, and the Court is not to take things in it by Implication, *Mich. 22. Car. B.R. & Pasc. 24. Car. B.R. Vide Stile's pract. Reg. p. 91.* For if it be not certain, the Defendant cannot make direct Answer unto it.

A Count ought to have Three Certainties: *bus, mentis, judicis*.

1. Sufficient Certainty, whereupon the Court may judge.
2. Sufficient Certainty, to which the Party may Answer.
3. Sufficient Certainty, upon which an Issue being joyn'd, the Jury may give Verdict without being inveigled, *Co. 5. 29. 3 Ed. 4. 21. Vid. Plow. in the Case of Partridge.*

Declaration,
insufficient in
Form, helped
by Stat. 16 &
17 Car. 2. c. 2.

If a Declaration be defective in matter of Form only, and the Defendant doth take no Exception against it, but pleads to Issue, and a Verdict is there,

thereupon found for the Plaintiff, the Defendant cannot afterwards take advantage of this defect in the Declaration; for the Defect is helped by the Verdict, and the Statute of *Jeofails*.

But if the Declaration be insufficient in matter of Substance, the Verdict will not help it; but the Defendant may take advantage of the insufficiency of it after a Verdict, *Mich. 22. Car. B. R.* El. cap. 14. extends only to any faults in Form in Court or Declaration.

* All Matters which do lye in the cognizance of the Court, ought to be set forth certainly in a Declaration; but 'tis not necessary to set forth certainly * Matters in the Cognizance of the Court. Matters of Fact, which are triable by the Jury, *Idem p. eod.*

A thing that is good and warrantable to be put in a Writ, is good and warrantable in a Declaration. *Tr. 23 Car. Stile's Reg. pag. 93.* For the Declaration is grounded upon, and warranted by the Writ.

Declarations which are grounded upon Original Writs, as all Declarations in the Court of Common Pleas are; if they be faulty, they cannot be amended.

But Declarations grounded upon a Bill, as the Declarations in the Court of Kings Bench are, are amendable if they be faulty, *Pascb. 24. Car. B.R. Stile's Reg. p. 93.*

Words insignificant.

Yet if there be words in the Declaration which have no signification, the words, shall be adjudged to be void words, and shall not hurt the Declaration ; but the Declaration shall be taken, as if those words were left out of the Declaration. *Idem p. eod. Pasch. 24 Car. B. R. Vide postea.*

Bad Original.

No Original.

Saunders moved in Arrest of Judgment in Ejectment by Original, in the Kings Bench, upon a Fault in the Original ; (for a bad Original is not help'd by Verdict.) But upon Mr. Livesay's certifying there was no Original at all, the Plaintiff had Judgment, tho' in his Declaration he recited an Original, *Vide Modern Rep. 3.*

*Common Pleas
Form.*

Observe in *Communi Banco*, that in drawing your Declaration,

in Debt, } Annuity,
Covenant, } Detinue, and
Account, } Replevin,

you must say, the Defendant *sum? fuit ad respond?*, &c.

And in Case } Trover,
 } and
Trespass, } *Ejectione firmæ,*

you must say, *Attac' fuit ad respond*, &c. But if it be *Summonitus* instead of *Attaciatus* 'tis but Form, and aided after Verdict. *1 Cro. 9 i. 2 Cro. 85, 108.*

Observe

Observe also in Banco Regis & Regin'. King-Bench
Form.

In Account, or Debt; If the Action
be in Debt or Account, then say
in the Declaration;

De placito quod reddat; as,
A.B. querit de C.D. in custod' Marr'.
&c. de placito quod reddat, &c.

In Covenant, — *in custod' Marr', &c.*
de placito Conven' fract', &c.

In Case, Ejectment, and Trover,
— *in custod' Marr', &c. pro eo vi-
delicet, quod cum, &c.*

A. B. Qui tam pro Domino Rege & Do- In Debt upon
mina Reginia, quam pro seipso in hac parte Statutes; pro
sequitur queritur de C. D. in custod' Marr', Qui tam, &c.
&c. de placito, quod reddat dict' Domino
Regi & Domine Reginie, & eidem A. B.
qui tam, &c. 10 l. legalis monete Angl'
quas dict' Domino Regi & Domine Reginie,
& eidem A. B. qui tam, &c. debet & in-
juste detinet, pro eo videlicet, quod cum
per quendam Actum, &c.

*In custod' Marr', &c. de eo quod ipse In Trespass.
primo die, &c. Vi & armis, &c.*

In Replevin the Form of both Courts
are alike.

Note, The *Rings-Bench* seldom name
what place the Defendant is of, unless
it be upon a Bond or Indenture, where
they observe the *alias dict'* precisely.

And in making up your Issues, &c. *In the Memo-*
in the *Memorandum*, after the words *randum of the*
In custod' Marr', &c. *Issues in the*
Kings-Bench. [1]

Of Pleas, &c.

If the Action be *de placito quod,*
then say, (*de placito Debit'*.)

If *pro eo videlicet*, then—(*de placito transgr' super Casum.*)

If in *Ejectment*, then—(*de placito transgr' & Ejectionis firme.*)

If in *Covenant*, then—(*de placito Convention' fract.*)

If in *Trespass*, then—(*de placito transgr', &c.*.)

See other General Rules concerning
the Count or Declaration, hereafter
set down.

*Script' Cur'
ostens.*

*Profert hic in
Cur'.*

Note, In the Kings-Bench in decla-
ring upon a Bond, Bill, or Indenture,
after the recital of the date of the
Specialty, &c. they say, *Cur' que. dict'*
*Dom' Regis & Domine Reginie nunc hic
ostens'*, &c. whereas in the Common-
Pleas they conclude their Declarations
with a *profert hic in Cur' scriptum pred'*
per quod Debitum pred' in forma pred'
*testatur, cuius dat' est Die & Anno supra-
dictis, &c.*

For the Declarations in several Actions.

Account.

In Account.

For the Declaration or Count in this
Action of Account, see the *Survey of
the Law, Tit. Account*, where the nature
of the Count or Declaration is fully
set forth. Also

Also see Townsend's Tables.

In Case, and
Assumpsit.

In what Court it lieth, for what and
against whom, with many other things
relating to the Declaration, see the
same Book under this Title.

Also see Townsend's Tables.

But as to Declarations touching *Assump-*
sits, &c. observe further.

That where a Joint Action doth lye
against divers, and some of their Names
are known, and some are not; the A-
ction may be brought against them that
are known by their particular names,
and Declare with a *Simul cum aliis, &c.*
Stile's Pract. Reg. pag. 8.

See more concerning Actions where
they do lye, and for whom, in *Pract.*

Reg. from pag. 5, to pag. 11.

How the Writ must be about a Cure, *Concerning the*
see 43 Ed. 3. 38. & 6 Writ. 627. *Process in it.*

About disturbance in a Franchise, see
9 H. 6. 45. 20 H. 7. 1.

About the Escape of a Prisoner, Nat.
Br. 95. B.

About Trover, &c. Cro. 1. 63. Hutton
394. Cro. 1. last published 79, 824, 829.
Cro. 2. 307.

The Process in an Action of Case, is *In Case* and
the same with that in an Action of Debt both
Debt and Trespass, per Stat. 10 H. 7. c. 9. alike.

Co. 10. 27.

And about this in all Cases, see Cro. 1.
part 23. 67.

How

How Promises ought to be grounded.

Promise grounded on a former Debt. If a Promise be grounded on a former Debt, in some Cases it will be needful to shew the Cause of the former Debt, how it grew due. For this see *Stile's Rep.* 548, 593, 642.

Upon an Indebitatus.

If one declare that *D.* is indebted to him 40*l.* and being so Indebted, in consideration thereof *Assumpſit solvere* upon request.

It was adjudged naught, because he doth not shew for what Cause he was indebted.

*On considera-
tion of For-
bearance.*

But where 'tis in consideration of Forbearance till such a Day, or upon a Special Promise; there it may be good, so alledged, *Cro. 2. 642. Hob. 31, 32. Bro. & Gold. 14.*

But where 'tis grounded on an *Indebitatus assumpſit*, where the Debt it self is the Consideration, there the Ground of the first Debt must be shewed, *Co. 10. 77.* See the same adjudged *Noy's Rep. 146.* but for the Forbearance, 'tis another Consideration.

Example.

As for Example : It was agreed, that where a Man is Indebted to another 20*l.* and he come to him and desires him to forbear it till such a time, and that he will pay it at that time: That in this case, if he sue

sue for the 20*l.* after the day, he need not shew how it did become due.

But if one be Indebted to another upon a simple Contract, and sue for it upon a Promise to pay it, the Plaintiff must shew how the first Debt grew due, *Bulstr. 1st Part 153. Hob. 147, 278.* See more 3 *Bulstr. 206, 207.*

A. declaraed, That the Defendant in consideration that he was Indebted to the Plaintiff 10*l.* for Pasturing certain Beasts in the Plaintiffs Ground, for Wheat and other Merchandizes by him had of the Plaintiff, did promise to pay, and it was held good, *Hob. 70, 7.*

If one declare against an Executor, *Executor.* That whereas the Testator was indebted to the Plaintiff 10*l.* and the Executor *in Conf. inde* did assume to pay it : This is not good without shewing the first Cause of the Debt. *Mich. B. R. Ingram's Case.* But if it be upon consideration of Forbearing the Executor, it may be otherwise. See *Co.2. 594.*

A. declared against *B.* That he *Upon an Inf-* counted with the Defendant for divers *mul compu-* Sums of Mony, and upon the Account *tasset.* the Defendant was found in Arrears to him 10*l.* and in consideration thereof did promise to pay it at such a day; and this was adjudged good, without shewing for what, *Hob. 16.*

So

So if one Sue for a Debt, and another pray me to forbear my Suit, and he will pay it. In my Suit upon this Promise, I need not shew the Cause of Debt I first sued for, Hob. 278.

aliter.

If one declare in *Affump'st*, That the Defendant being to account with the Plaintiff *pro diversis debitis insimul computaver'*, and found upon Account indebted so much, in *Considerac' inde* the same day promised Payment thereof at a certain day; and it was held a good Declaration, altho' there was no Forbearance of the Debt set forth, Bulstr. 3d Part 208.

Quantum me-
rit.

If one sue upon a Promise, to satisfie him for Work done, he must shew in the Count how much he deserved for his Work, Mich. 17. *Jus. B. R.*

Quantum vale-
bit.

So if one sue for a thing sold, no Price agreed upon, he must aver it to be worth so much.

Averment in Declarations.

Rule of Aver-
ment in Decla-
ration, of some
thing to be first
done by the
Plaintiff.

If one Promise to do something to me, in consideration of something to be done by me to him before it; if I will sue him for that he is to do for me, I must aver, that I have done that which was first to be done by me, and till that be done I may not sue upon that Promise.

As

As if one promise to me in consideration, that I will forbear my Debt till such a day, he will pay me, &c. I must shew I did forbear; for if I sue for it within the time, the *Assumpſit* and Action is gone.

But otherwise it is where one Promise is the consideration of another Promise; there nothing is to be set forth but the Promise it self to maintain the Action, and the Plaintiff may count, That in consideration that he hath promised to the Defendant, the Defendant hath promised another thing to him, *Brownlow* 137. 2 *Bulſtr.* 334. *Hob. pl. 7. 27.*

And if the thing to be done by me, *Averment of Place and Time.*
in consideration of another thing to be done by another, be to be done at a place and within a time certain, I must set it forth to be so done. And if all or part of the Consideration be to stand to an Award, or make a Surrender; it is not sufficient to say, I was ready to do it; but I must say, I have done it, 1 *Bulſtr.* 109. But see *Leon.* 405. and see after *Averment in Pleas.*

But where there is a Promise for a Reciprocal Promise, there needs no Averment of Promise. Execution, of what is executory in the Promise, as is said before, 1 *Cro.* 543.

In this Action upon an *Assumpſit*, if the Consideration be Executory, then the *Assumpſit* and Executed.

the Declaration must set forth the time and place when and where made, and after it must be averr'd *in facto*, that it was performed and executed accordingly (except, as aforesaid, in the Case of Reciprocal Promises, for there it needs not.) 2 Brownlow 137. Bendl. 150. Nlv.

Exception.

* See Leon. 205 177. 2 Cro. 620, 583. *

Two Considerations in the Declaration pursuant one to the other, and an Action brought before one of them perform'd and held good; but otherwise if they were Collateral, as in Consideration, That you are my Council, and shall ride with me to York, I promise to give you 20l. All these Considerations must be proved; &c.

Non Assumpsit pleaded.

And if in the first case, where it is Executory and averr'd that it is executed, if there the Defendant plead *Non Assumpsit* generally, and do not plead the Special Matter, he cannot take Exceptions to that Count for the default aforesaid, as where he pleads Specifically to that, 2 Brownl. 137.

For where the Consideration is Executory, the Defendant may take Issue as well for not performing the Consideration Executory, as upon the Promise. So where a Man assumes to pay Money, or do any thing upon Condition, the Defendant may take Issue upon the Condition, and needs not plead *Non Assumpsit*. But if he pleads *Non Assumpsit*, then he cancellereth the Performance of the Condition, Brownl. & Goldsb. 8, 10, 11.

And where *Non Assumpsit* is pleaded to a Consideration executed, the Plaintiff needs only to prove the Promise. *Idem ibid.*

And

And in all cases where a Notice and Demand is Necessary to be made to give an Action therein, Averment must be made of it in the Declaration when the Action is brough ; and so for other like things. See 1 Cro. 73, 74, 85, 97. See Hob. Pl. 63.

*Averment of
Notice and
Demand.*

Of Notice, Request, or Demand.

In Cases where it doth rest in the *Rule of Notice.* equal Knowledge of the Parties what is to be done, there no Notice is to be given by the one party to the other what is done ; but where it is more in the knowledge of him to whom it is to be done, there Notice is to be by him given : For where a Duty doth arise upon a private Act of the Plaintiff, there Notice must be given of it before the Action can be brought, and it may be, the Breach may be so private, that the Defendant by no possibility can know it without Notice. Also where a thing is to be done by a Stranger, and lies as much in the knowledge of the Defendant, as of the Plaintiff , there the Plaintiff is not bound to give Notice to the Defendant. And in Case where a Penalty is to be recovered, for the not doing of the thing , there Notice must be given. 1 Bulstr. 12, 13. Cro. 2. 492, 493. Cro. 2 Car. 34. Jenk. Cent.

*Cent. 7. Case 11. 92 Hob. 5 1. 1 Cro. 34. 385.
Hut. 80.*

Difference.

Also there is a difference where the thing to be done is Executed, and where it is Executory.

Where Executed, no Notice is to be given.

Where Executory ; as, *What Cloth you shall deliver to J.S. I will see you paid for it* ; in this case he must give Notice what Cloth he doth deliver ; and so of the like.

Difference.

Also there is this difference, when it rests upon a Matter to be done between the Parties themselves : Notice is to be given to the party, who is to make a payment of Mony, upon an Act to be done by the other, to whom the payment is to be made. Otherwise where 'tis to be done by a Stranger ; for there he hath taken upon himself to take the Notice at his peril. See for this 3 Bulstr.

44.

There is no difference when a thing is to be done upon Request, or upon reasonable Request, 1 Cro. 300. 2 Co. 3. 1 Rol. 442.

Award.

An Award is made, That the Defendant shall pay the Plaintiff 10 l. upon Request ; there *licet saepius requisit³* is sufficient, 1 Cro. 385. 35. 2 Cro. 640.

And

And the Rules for this are as follow,
viz.

Where Money is to be paid upon Request, there must be a precise Request, or Demand. Rule of Request, or Demand.

alledged, 2 Cro. 183. Leon. Rep. pl. 389.

In all Cases where the Ground of the Action is for the Debt, there the Law induceth the Promise, and the Request is not issuable, nor parcel of the Consideration: So that where there is a Duty in the Plaintiff before, there the General *Lices s^epius requirit*, &c. is sufficient; but where the Request makes it a Duty, there the Request must be precisely alledged. So also where the Action is founded upon a Collateral Matter, and not for a meer Debt or Duty; there the Request is issuable, and ought to be expressly alledged, *Yelv.* 66, 67. *Godb.* pl. 387. *VVincb.* 2. *Gold.* 13, 14. *Cro.* 2.

183. See *Leon.* 73.

And where Request is to be set forth, there 'tis Material and Traversable, and therefore the time and place thereof, must be certainly set forth, *Cro.* 1. 179.

3 *Bul.* 298, 316.

A Special Request must be alledged upon a Promise, to save a man harmless, 2 *Bul.* 229.

And so in all other Cases where Notice is to be given, or Request or Demand to be made, in Case to produce and warrant the Action; the same

C must

*Cent. 7. Case 11. 92 Hob. 5 i. 1 Cro. 34. 385.
Hut. 80.*

Difference.

Also there is a difference where the thing to be done is Executed, and where it is Executory.

Where Executed, no Notice is to be given.

Where Executory ; as, *What Cloth you shall deliver to J.S. I will see you paid for it* ; in this case he must give Notice what Cloth he doth deliver ; and so of the like.

Difference.

Also there is this difference, when it rests upon a Matter to be done between the Parties themselves : Notice is to be given to the party, who is to make a payment of Mony, upon an Act to be done by the other, to whom the payment is to be made. Otherwise where 'tis to be done by a Stranger ; for there he hath taken upon himself to take the Notice at his peril. See for this 3 Bulstr.

44.

There is no difference when a thing is to be done upon Request, or upon reasonable Request, 1 Cro. 300. 2 Co. 3. 1 Rol. 442.

Award.

An Award is made, That the Defendant shall pay the Plaintiff 10 l. upon Request ; there *licet saepius requisit* is sufficient, 1 Cro. 385. 35. 2 Cro. 640.

And

And the Rules for this are as follow,
viz.

Where Money is to be paid upon Request; there must be a precise Request alledged, 2 Cro. 183. Leon. Rep. pl. 389. Rule of Request, or Demand.

In all Cases where the Ground of the Action is for the Debt, there the Law induceth the Promise, and the Request is not issuable, nor parcel of the Consideration: So that where there is a Duty in the Plaintiff before, there the General *Licet sapientia requirit*, &c. is sufficient; but where the Request makes it a Duty, there the Request must be precisely alledged. So also where the Action is founded upon a Collateral Matter, and not for a meer Debt or Duty; there the Request is issuable, and ought to be expressly alledged, *Velv.* 66, 67. Godb. pl. 387. *VVincb.* 2. Gold. 13, 14. Cro. 2. 183. See *Leon.* 73.

And where Request is to be set forth, there 'tis Material and Traversable, and therefore the time and place thereof, must be certainly set forth, Cro. 1. 179.

3 Bul. 298, 316.

A Special Request must be alledged upon a Promise, to save a man harmless, 2 Bul. 229.

And so in all other Cases where Notice is to be given, or Request or Demand to be made, in Case to produce and warrant the Action; the same

C must

must be set forth in pleading, and be made and done accordingly. See 2 Cro. 652. 3 Bulstr. 297.

See also 1 Cro. 280, 281. Last pub. 35, 97, 455, 235. Noy's Rep. 98. Leon. pl. 159, F67.

Three persons promise, and a Request to one. If three assume to pay or give upon Request, if the Request be made to one of them, 'tis good enough, Noy's Rep. 135.

About Damages.

Note, If a Contract be made, and no time set when to pay the Money, and the Plaintiff sues for it before Request; he shall not have Damages besides the Duty, as he shall where he doth make Request, Godb. pl. 454.

Note also, Damages are given according to the Consideration; and if the Jury be excessive, Relief may be had in Chancery, Owen's Rep. 34.

Two Promises in one Action, and entire Damages.

If one bring an Action upon the Case for Two Promises, the one for a Horse, the other for Money lent, and the Jury at the Trial give the Damages entire; this is good, 3 Bulst. 258.

Two Considerations of one Assumption.

Where there are two Causes of Considerations of the Promise alledged in the Declaration to be executed, and either of them is sufficient, and one of them is well alledged, and the other ill, the whole Declaration is naught, 2 Cro. 504.

Where

Where a Promise is of two parts, or Assumpsit of
hath two branches, there you may lay ^{two parts.}
the breach to be in either of them, 2

Cro. 195. 10 D. 2d. 1. Non fit to be laid

It doth generally suffice, and is most Breach laid
proper for the Plaintiff, to lay the according to
Breach as the Promise is made, Yelv. 40. the Promise.

If it appears by a man's own shewing,
that he sues before his Cause of Action
doth arise (be the Cause never so good,)
this Action is naught, Yelv. 70. Bend.

158. Hob. 153.

There must be sufficient Certainty in Suit before
the Declaration; for Incertainty may Cause of Action
marr it, Yelv. 110, 111. on.

Yet there may be Faults in a Decla- Certainty.
ration, that being demurr'd unto will
make it naught; and that after plead-
ing and a Verdict given for the Plain-
tiff will be cured, and then will not
hurt the Declaration, 1 Cro. last pub.
427. But the Statutes of Jeofails only
help Form, and not substance. Vide
postea.

The Declaration was solvere, and said Some Faults
not to whom; yet adjudged good, Noy's helped.
Rep. 38, 39. Quære.

The Declaration sets forth a Promise, Incertainty.
to pay *cuidam*—Fountain, leaving out
his Name of Baptism, and not good,
Stile's Rep. 153.

Of Pleas, &c.

A Declaration may be bad for Miscounting. An Action was brought upon an *Indebitatus* for 100 Weathers, sold by the Plaintiff to the Defendant at 18*s.* a Sheep, which amounts to 190*l.* and it seems that Mistake in casting made the Declaration naught. *Stiles 214.*

See for this 3*Cro. 22.* 1*Cro. 22.* *Bendl. 156,* 20*1.* *Jenk. Cent. 7.* *Case 54.* *Cent. 8.* *Case 75.* 2*Cro. 569.* *Popb. 209.*

See also, *Godb. pl. 436,* 48*4.* *Popb. 209.* *Hob. 95.* *Rol. 335.*

See *Yelv. 5.* where the Plaintiff for 10*l.* and Counts for 10*l.* for a Horse, and 5*l.* by another Contract, and the 5*l.* said to be Surplusage; because the Plaintiff was answered by the Principal Contract in the Count. See 1*Cro. 331.*

In Contracts, or Assumpsits.

If any Substantial Variance be between the laying of the Action and the Evidence, it is dangerous, and therefore it is good policy in an Action brought upon a Promise, to ground it upon one Promise in the substance of it; but to lay the Promise divers ways and in different Words, in the Declaration, as near to the Case as you can name it, that in one of them you may hit the Promise it self; and to the intent, that upon the Trial the Plaintiff may

may rest and rely upon that way of laying it, that his Witnes are best able to prove, *Mich. 24 Cro. 1. B.R. Stile's Regist. 32 Hob. pl. 114.*

He that declares upon an *Affumpſit*, *The Declara-*
tion must come
near to the
Promise, and
not be of more
or less things. must declare as the Case is; for if upon proof it appear that he alledge more things promised than true, or les than is true, and the Jury find a part of the things promised only, or more than is set forth in the Action; the Plaintiff shall not have Judgment for this, *1 Cro. last pub. 147,882. Stile's Reg. 32, & 92.*

That where a Promise is the very *Where a Pro-*
mise is a
ground of the
Action.
Inducement. ground of the Action brought, there it must be pleaded and set forth precisely; but where 'tis but inducement to the bringing of the Action, there it need not be so precisely set forth, *Stile's pract. Reg. pag. 30.*

*2 Cro. 183, 206, 207, 247, 289, 307, Authorities in
326, 404, 405, 548, 552, 603, 644, 652, Point.
663, 664.*

See more of this *Velv. 17, 19, 40, 49,
50, 93, 128. Cro. 1. 22. (149, 150, 193,
194, 249, 271, 302, 307, 337, 477, 487,
807, 848, 849, 882, last pub.) 2 Cro. 10.
245. Bendl. 157 Noy's Rep. 10. 50. Bulſtr.
1 Part 16. 124. See 2 Brownl. 40.*

See concerning Actions, *Stile's pract. Reg. from p. 5, to 11. and for Affumpſit or Promise, idem p. 30, 31, 32, See Compleat Sollicitor and Survey of the Law.*

*Authorities
for Declara-
tions about*

Breach of Trust.

*About a Nu-
sance.*

About Deceit.

*About Trover
and Conver-
sion.*

*About Bail-
ment.*

*About Suits in
Law.*

*Against a
Hundred.*

*For Doing, Not
doing, and Mis-
doing.*

For Declarations in all Actions about
breach of Trust, see Dyer 266. 2 Cro.
262, 26.

For those about a Nusance, see 33 H.
6. 26. 2 H. 4. 1 I. Action, &c. 24. II R. 2.
Action, &c. 36. 9 Co. 53, 54. 8 Co. 57.
9 Co. 24. 1 Cro. last pub. 180, 427, 753,
2 Cro. 673. Yel. 225. Wmch. 16. Leon. 235.
Bendl. 160. Brownl. & Goldsb. 6.

For Declarations about a Deceit, 1 Cro:
last pub. 44. Libr. Intrac. 685. Selb. I. N.
B. 98. F. 20. H. 6. 24.

For those about Trover and Conver-
sion, Dyer 121. 1 Cro. 178. 2 Cro. 50. 428.
1 Cro. last pub. 78, 378, 480, 817, 818,
819, 865, 883. Hutt. 10. 2 Cro. 129, 638,
664. Yel. 43, 44. Bendl. 150. Noy's Rep.
139, 145. Brownl. & Goldsb. 16, 17.
Leon. 251, 335. Owen's Rep. 27, 131, 141,
151.

For those about Bailment, Owen
153.

For those about Suits in Law, 1 Cro.
last pub. 57. 7 H. 6. 45. Action 4. 1 Cro. 33.
(last pub. 53, 352, 877, 895, 913.) 2 Cro.
241, 242, 351.

For those against a Hundred, 1 Cro.
26, 29. 2 Cro. 350. Hob. 339.

See Compl. Sollicitor from p. 199 to
216.

For those about doing, not doing,
and misdoing, 1 Cro. last pub. 57. 1 R. 2.
Action 36. 43 Ed. 3. 33. 45 Ed. 3. 27. pl. 56.
Action

Action, &c. 50. Dyer 312. 19 H. 6. 45.

20 H. 7. 1. Action, &c. 30, 47. Dyer 266.

2 Cro. 255. ~~printed in Latin & French~~

See Survey of the Law, Tit. Action upon the Case.

For the pleas and bars to an Action on Townsend's the Case and Assumpsit, see after in Bars, Tables.

See also Compleat Sollicitor, from 191 to 199.

See Townsend's Tables.

Covenant.

Where, and against whom it lies, *Covenant*.
and for the Count or Declaration, see Survey of the Law, Tit. Covenant, p. 142.

See Townsend's Tables.

Debt.

Concerning this Action, Count, and *Debt*, Declaration, see Survey of the Law, Tit. *Debt*, pag. 159. *Touchstone of Prec.* pag. 81.

See Townsend's Tables.

See Pratt. Register, p. 53, & 102.

Detinue.

Where, and against whom it lies, for what, and for the Count or Declaration therein, *Detinue*. see Survey of the Law, p. 132.

Of Pleas, &c.

See Townsend's Tables.

See Compleat Sollicitor, p. 102, 103.

Observe hereafter Detinue.

Ejectment.

Ejectment.

Where, against whom, and for what it lies, and for the Count or Declaration therein, see *Survey of the Law*, p. 223.

See Townsend's Tables.

See Compleat Sollicitor, 219, 220.

Quare Impedit.

Quare-Impedit.

Where, for whom, against whom, and for what it lies, see *Survey of the Law*, pag. 234, &c.

See Touchstone of Prec. pag. 205.

See Townsend's Tables.

See also Compleat Solliciter, p. 245.

Replevin.

Replevin.

Concerning Replevin and Avowry, see *Survey of the Law*, pag. 287, &c.

See Touchstone of Prec. pag. 248.

See Townsend's Tables.

Slander.

Slander.

Where, for whom, against whom, and for what words, &c. this Action will lye; see *March his Book for Slander*, and

and Sheppard's for Slander.

See Touch. Prec. Tit. Words.

See Townsend's Tables.

But Note, That this Action is best Note.
laid when 'tis said *falso & malitiose dix-
it, &c.*

It matters not whether the Plaintiff do in his Count set forth all the Circumstantial words as they were spoken, so as he set forth the very words truly that are actionable; and that he must be sure of, for a little Variance may marr all; and therefore 'tis wisely done of those that where they doubt, they charge the Defendant with speaking of Various words at several times, and several ways, and by that are sure in one of them to hit upon the very Words themselves, or the substance thereof.

But then he must take care, that the Jury do assess Damages only for the words that are spoken, 1 Cro. 238.

Trespass.

Where, for whom, against whom, *Trespass.*
and for what this lies, and for the Count or Declaration therein, see Survey of the Law, p. 228, &c.

See Compleat Sollicitor, pag. 217, 218,
219.

See Touchst. of Preced. p. 264, &c.

See

Of Pleas, &c.

See Townseld's Tables.

Troyer.

Troyer.

Troyer; In counting upon Troyer of Goods, to every parcel you ought to shew the price and value, otherwise 'tis ill. F.N.B.88. 2 Cro. I. 30, 146, 654.

See for this Compleat Sollicit. 222.

See before pag. 22, and observe after.

See Townseld's Tables.

Wast.

Wast.

See for this Touchstone of Precedents, pag. 317.

See Pract. Reg. 343.

See Landlord and Tenant, from 220 to 251.

See Townseld's Tables.

Variance in Declaration, &c.

*Declaration
must not vary
from the Plaintiff.*

A Declaration ought not to vary or differ from the Plaintiff; that is, the Cause which the Plaintiff doth express in his Writ, why he brings his Writ.

For the Writ is the ground of the Declaration, and that which warrants it, Pract. Reg. 90.

This is meant of Originals; see Pract. Reg. 93.

Defen-

Defendant pleads *Non Assumpsit infra Two Originals, sex Annos*. Plaintiff replies of another ^{first varies from the second.} Original brought, upon which the Defendant was Outlawed and Reversed, and that he presently thereupon brought his new Writ.

Altho' the first Original vary from the second in damages, time, or place; yet it is good to maintain the Action, if it be aver'd to be for one and the same Cause, *In Inst. 182. 1 Cra. 295, 443. Stiles 442.* *mvscq absolt* *but* *no obiectio*
See for *Variance in Pleadings* hereafter.

Distinction of some Words to be used, or refused in Declarations.

If one declare in an Action of Trespass, for taking away of Live-Cattle; he ought to say, that he took away his Cattle pretii so much, by the words *Cepit & abduxit pretii 10 l.*

But if he declare for taking away *for things without Life,* *valentiam* of so much, by the words *Cepit & asportavit ad valentiam 10 l.* *Touch. of Prec. 28, 29.*

If one declare, *Quare bona & catalla bona & causa cepit, vizi. unum scriptum abl.*, it is ill^l *talla.* because a Bond, or the Value thereof cannot be demanded by the Names, *Bona & Catalla*, See *Vel. 37, 220.*

If

Equum cepit. If one declare, *Equum cepit à persona Quer'*, and says not *Equum suum*, 'tis ill, 2 Cro. 46. Yelv. 36.

Hic in Cur' prolat'. If one Count upon a Bond, if it is not said *hic in Cur' prolat'*, 'tis Error in substance, 2 Cro. 32.

Concessit se teneri. The Count was, *Quod concessit se teneri*, and does not say, *Per scriptum Obligatorium*: But at the latter end says, *Et profert hic in Cur' scriptam pred' quod debitum pred' testatur, &c.* The Defendant demands Oyer, and pleads payment, and the Count was adjudged good, 1 Cro. 209. 2 Cro. 420. see 3 Cro. 737.

Proferit hic in Cur'. The Count was, *Quod cum in trespass* the Declaration is, *Quod cum* the Defendant such a day and year assaulted the Plaintiff; the Declaration is erroneous; but if it say, *Quod cum* the Defendant *fuit in pace dicti Domini Regis*, 'tis good, Plow. 128. 2 Cro. 537. 3 Cro. 507. Stiles 117, 133, 430. 2 Bulstr. 215.

In Battery. 'Twas the Opinion of Saunders, That *Quod cum in transgr'* makes it naught after a Verdict, and that a General Demurrer to such a Declaration is sufficient; neither is it good in Battery.

In Ejectment. But in Ejectment, and so in Debt, *Quod cum & tamen non solvit*, good; and in Case. See 2 Bulstr. 214, 215. Sherland and Heaton, Nov 58. Cro. Eliz. 507.

In

In Count upon an *Affumpſit*, to pay Narr' in *Aſſumpſit*.
 2 d. for every Farthing worth of Da-
 mage which the Plaintiff should have
 sustained; you ought to shew how ma-
 ny Farthings loss he hath sustained, or
 it will be ill, Tel. 37, 220. Mich. 9 Fac.
 Doit incantre
 B.R. Coventree's Case. cōment.

In Count, by an Assignee for breach Narr' by an
 of Covenant, if it appear in the Count *Affignee*.
 that he is *Affignee*, 'tis no matter whe-
 ther you said in the beginning that he
 was *Affignee*, 2 Cro. 823.

If a Bill be Filed in Hil. Term, and Abatement in
 declares, That the Defendant had af- Trespass, with
 faulted and beat his Servant, Per quod a Continuando
 he lost his Service from such a day to till after the
 such a day, and continues the Loss Action brought.
 and Trespass till after the Action brought: The Bill shall for that cause
 abate, 2 Cro. 618. 1 Rol. 576. See after
 for *Abatement*.

In Counting in Ejectment, upon a Ejectment on a
 Lease made by A. and B. It appear'd Joint Lease
 A. was Tenant for Life, and B. had the by Tenant for
 Reversion, and Adjudged against the Life, and he
 Plaintiff. For the Plaintiff declared in the Rever-
 of a joyn Demise, and it was Resolved sion.
 it was the Lease of A. during his Life,
 and the Confirmation of B. and after
 the death of A. it was the Lease of B.
 and confirmation of A. 6 Co. fo. 14. 6.
 Treport's Case; and there said, That if
 Tenant for Life, and he in Remainder
 joy

joyn in a Lease rendering Rent, Tenant for Life shall have the Rent during his Life.

Narr' upon the Stat. for Usury, If the Plaintiff declare against the Defendant upon a corrupt Contract made against Stat. 12. C. 2. against Usury, he must say in his Declaration, That the Defendant *corrupte aggredit*; or else shew, that the Contract was made *pro Usura*, contrary to the Statute: For he must put the words of the Statute, Pract. Reg. 90. a. 1. *Usuram non debet esse contractum nisi pro usura*.

Narr' for Indicting him at the Quarter-Sessions. If the Plaintiff count against the Defendant, That the Defendant at the General Sessions of Peace held at such a place, in such a County such a day, before J. & sociis suis tunc Justic', &c. malitiose, &c. *quandam Bill Indictamentum* against the Plaintiff, *Scribit scit continen'*, &c. and doth not alledge, that the Justices were Justices of Oyer and Terminer, and yet the Declaration held good; but the Plaintiff must also shew that he was thereupon acquitted, or the Action will not lie, N. & Th. 6.

Acquittal.

Narr' for Disturbance in Church, Fair, or Market.

In an Action upon the Case, for disturbance of the Plaintiff in his Seat in the Church, or to hold a Court or Burial in the Church, or to use a Fair or Market; 'tis sufficient to say, *Malitiose disturbavit & impedivit* generally, without shewing any special Disturbance, 2 Cro. 606. See Co. Intr. 8. ad l. 1. c. 1. But

But upon Covenant, for the enjoyment of any thing, when you assign a Breach, you ought to shew for what you were disturb'd, and how: For 'tis not sufficient to say, *Quod non potuit habere & gaudere, &c.* but yet you need not shew your Title specially, *Yelv. 30.*
8 Co. 91. 3 Cro. 914.

Covenant to Repair Houses, the Breach must be assigned particularly,
Pract. Reg. 49.

But in an Action of Debt brought up on an Obligation, for breach of the Condition thereof, the Plaintiff is not to assign in what the Breach is, until the Defendant hath pleaded performance of the Condition, *Idem pag. 49.*
See after 162.

If a Man make several Executors, one as to his Goods, and another as to his Leases, they may be sued as one Executor, *1 Cro. 293.* See more after.

An Executor sells the Goods of his Testator, and for the Mony unpaid he brings an Action; 'tis not necessary in such case to name him Executor. And so for Goods taken after the death of the Testator, altho' the Mony recovered shall be Assets. *Went. 52. Plow. 81. a.*
Yelv. 33.

In Counting against an Executor of his own wrong, you must name him *Executor of his own wrong.*
Exec' test' & ult' volum', &c. because there *Narr.* is

is no other Form of Counting against such an Executor, 5 Co. 30. Yelv. 137.

*Executor brings
Debt for Rent
upon Testator's
Lease.*

In Debt by an Executor for Rent upon Lease made by the Testator, you may Count thus, *Quod cum* the Testator (*scilicet die & Anno*) *fuit possess. de uno Messuagio pro termino 30 Annorum,* (or *pro termino exceden' viginti ann.*) *Et sic inde possess. existent' dimisit, &c.* without shewing the Title, and 'tis a good Form, Mich. 33 Car. 2. *Trasle vers. King.*

See more concerning Executors,
Pract. Reg. 119.

See after more of Executors.

Note; Executors and Administrators, must in their Declarations set forth the Probate of the Will, or Letters of Administration; otherwise he doth not entitle himself to the Debt.

Observe more of this hereafter.

*Non Promisit,
Land to descend.*

The Father promised his Land to descend to his Son upon payment of Money; which paid, the Son in an Action against the Father, declares *Quod non promisit* his Land to descend, &c. and *per Cur'* the Action well brought, and Judgment, *pro quer.* 2 Bulstr. 18. Gray verl. Gray.

*Estates of
Husband and
Wife.*

In declaring on Estates of Husband and Wife, you ought to say, *Quod cum insimul sejisti fuer'*, 2 Bulstr. 32.

Note,

Note, When you declare upon a Lease for Non-payment of Rent ; you must recite the Lease over the Redendum, and the Services, Duties, and He-riots.

When you declare for breach of Covenant, you must recite the Deed over of Covenant.

If there is only a Hand to a Writing, *VVhen a Hand* and not a Seal, Covenant lies not ; but *to a VVriting,* *and no Seal.* Case upon Agreement , and declare, That in consideration the Plaintiff had promised to perform the Agreement on his part, the Defendant promised to perform on his part , and so assign breach, *Ed.S.*

If a Concessit solvere be brought for 100*l.* where there is but one Penny due, *vere and Law* and the Defendant wage his Law and doth not prove it, and brings not Witnesses to testifie that they believe he Swears truth ; 'tis said in this case the Plaintiff shall recover the whole. *Sed quære.*

See after for *Wager of Law.*

If a Bond be dated 1 Junii, *Anno Bond diff'ret* 22 Reg' Annoque Domini 1671. when as in Anno Dom' it should be 23 Reg' ; it is best to de- *and Anno Reg.* clare, 1 die Junii Anno Dom' 1671. per quoddam scriptum suum, &c. leaving out Cujus dat' est eisdem die & Anno, and it will be well enough, *Ed. S.*

Plaintiff declares upon 3 *Affumpſits*, and the third laid by the date to be before the first, and naught, See *Yelv.* 93.

*Declaration
amended.*

Note, Upon the Plaintiffs amending his Declaration , he hath Election to pay Costs and go to a Trial , or to give an Imparlance. But if the Defendant amend also, he may proceed, and Cost need not on either side, 1 Keb.

175.

Costs.

In Ejectment where the Title is material , the Plaintiff amended his Declaration after Plea (but while all was in Paper) in the Date of his Action , without paying Costs, 1 Keb.

14.

*Persons Name
struck out of the
Declaration.*

It was moved *pro Quer'*, That a person named in the *Simul cum*, being a Material Witness, might be struck out, and it was granted ; and Justice Keeling said, *If nothing was proved against him, he might be a Witness for the Defendant.*

*How to conclude
a Declaration
against an
Hundred for
Robbery.*

In an Action against an Hundred for Robbery , it is good to conclude the Declaration *contra formam Statuti*, and not *Statuorum*, if it be upon two Statutes, *Yelv.* 116. 1 Cro. 187.

How to sue out this Action, see *Compleat Sollicitor* from pag. 198 to 217.

For General Rules concerning the Count or Declaration , observe after.

For

~~K~~ For the Cause of Actions, and who shall have them, see before; and see Pract. Reg. from pag. 5 to 11.

Touchstone of Prec. from 25 to 43.

See *Compleat Sollicitor*, and *Compleat Attorney*, in the Courts of King's-Bench and Common-Pleas.

See the *Survey of the Law* under proper Titles, &c.

An Action upon the Case grounded *Actio super Casum*; *Why.* upon a Promise, the Declaration is *Actio super Casum* in the Singular Number, altho' the Action be brought upon divers Promises, for the word includes all, Pract. Reg. pag. 5.

Rule for Laying of Actions.

All Real and mixt Actions, as *Waif*, *About the Ejection* firmæ, &c. must be brought in *the County where the Land lieth*, and cannot be laid in any other place, for they are Local; so are Trespasses of *Quare clausum fregit*, and the same places must be set down in the Declaration wherein the Wrong was done.

But by the Common Law and Practice, All Personal Actions (that are not Local in their own nature, as is a *Quare clausum fregit*) and all Transitory Actions, as *Debt*, *Detinue*, *Annuity*, or *Account*, &c. may be brought in any County where the Plaintiff pleaseth,

and the Plaintiff by his Declaration may suppose it to be done in any Place or County, (notwithstanding , Stat. 6 R. 2. cap. 2. which saith, *Writs of Debt, Account, &c. shall be commenced in the Counties where the Contracts were made*)

* But Quære 9 H. 7. Rot. 109. Old Books of Entries 183. Crompt. Jur. Courts 101. b. F. N. B. 116. for that Statute was never put in use *, by Doderidge, Hill. 16 Jac. B. R. and so Coke upon Litt. 282. a. Perk. Grant 80. Brook cap. 45 1. Kitch. 136, 180. and so is the Practice in Courts , whose Jurisdiction is not limited , That in an Action brought for Transitory things, as *Beating a Man*, or the like , the Wrong being done in one Town, the Plaintiff may alledge it to be done not only in another Town, but also in another County, and the Jury upon *Not Guilty* pleaded, &c. are bound to find for the Plaintiff : And in these Cases, if the Plaintiff lay the thing to be done in another place, the Defendant may not traverse it, and say it was done in another place , and not the place set down in the Declaration, unless there be Special Cause of Justification , which doth extend to the place : As if a Constable of a Town Arrest a Man for breaking the Peace, and an Action is brought against him, and laid in another County ; there he may traverse the County, (but withal he must add) *And all other places,*

*Action against
a Constable, or
other Officer,
is Local.*

saving

saving the Town whereof he is Constable.
 So for taking of Goods Damage fea-
 faint, in another County, Co. Lit. 282,
 283. But if an Action be brought a-
 gainst an Officer for any thing done
 about his Office, it must be laid in the
 County where the Fact was commit-
 ted (or upon Trial it will go against
 the Plaintiff;) and so when an Action
 is brought against a Man, for doing any
 thing under any Act of Parliament.
 See Pract. Reg. pag. 5, 6. he saith, Gene-
 rally (and it is the better and more in-
 different Course) *Transitory Actions use*
to be laid in that County, where the Cause
of Action did first arise.

Or upon an Affidavit made by the
 Plaintiff, the Court will many times al-
 ter the *Venue*; but how this may be *Venue changed.*
 prevented, see 1 Keb. 859.

When an Action is brought for Rent *action for*
 by the Lessor against the Lessee, the *Rent, where*
Action may be brought either where to be laid.
 the Land lies, or where the Demise
 was made; but when 'tis brought by
 or against an Assignee, it must be
 brought where the Land lies, altho'
 the Money is to be paid where the De-
 mise was made, 1 Cro. 143, 184. 7 Cro.
 2. 3 Cro. 636. Dyer 40.

Debt by an Executor of a Grantee *By an Execu-*
 of a Rent-charge against the Pernor *tor.*
 of the Profits for Arrearages, must

*Against an
Administrator.*

be where the Land lies, *Hob. 37.*

If an Action of Debt be to be brought against an Administrator for Rent, which was due by the Intestate upon a Contract made betwixt the Plaintiff and the Intestate in his Lifetime, the Action must be brought in the County where the Contract was made: But if an Action of Debt be brought against an Administrator, for Rent due for Lands lett by the Plaintiff to the Intestate, but growing due since the Letters of Administration granted unto him; the Action must be brought in the County where the Lands lye, for which the Rent is due, *Pract. Reg. 103.*

*By the Devisee
of a Reversion.*

Debt for Rent by the Devisee of the Reversion; it shall be where the Land lies, *Winch. 69.*

Ejectment.

Ejectment of Land in *Middlesex* may be well brought in *London*, alledging the Demise to be made in *London*, *2 Rot. 603.*

*Trover and
Conversion.*

Where the Trover of Goods is in one County, and the Conversion is in another County, the Action brought for these Goods may be laid in the County where the Conversion was; for the Conversion of the Goods is part of the Cause of Action, *Pract. Reg. 326.*

If

If an Obligation be made beyond ^{Bond made} Sea, and bears date there ; it may be ^{beyond Seas.} sued in *England*, and alledged that it was made in *England*; and it cannot be traversed, *I Inst. 26 1. 2 Cro. 76.*

If two, or three, or more bind themselves in an Obligation by the words *Obligamus nos*, and say no more, this Obligation is joyn^t and not sever^{al}; but if the words be, *Obligamus nos & utrumque nostrum*, or *Nos & unumquemque nostrum*, or *Nos & quemlibet nostrum*, or *Nos & alterum nostrum*, then the Obligation is both joyn^t and sever^{al}; and where 'tis Joyn^t, the Plaintiff must sue all the Obligors living together, or else the others may plead in A-^{Of Suing a}
^{joynt and sever}
Hil. 19 Eliz. B.R. batement; but where 'tis both Joyn^t and Sever^{al}, the Plaintiff may sue all together, or all apart, at his pleasure,

And so 'tis of Joyn^t Promises, and Sever^{al} Promises, *Co. 9. 53.*

And so of Covenantors, &c. Joyn^t or Sever^{al}, *5 Co. 19. 23 Dyer 338.*

About the Limitation of time for bringing Rule Actions.

By the Stat. 21 *Jac. 1. 16.* All Actions *Case, Account, Trespass, Debt, Detinue, Trover and Replevin.*
upon the *Case* (other than for Slander;) Actions for *Account* (other than concern Merchandise;) Actions of *Tres-*

Of Pleas, &c.

pass, Debt, Detinue, Trover and Replevin, shall be commenced within six Years after the Cause of such Actions or Suit, and not after.

*Assault and
Imprisonment,
&c.*

All Actions of Trespass, of Assault, Battery, Wounding, and Imprisonment, within four years after the cause of Suit, and not after.

*For Words,
or Slander.*

All Actions upon the Case for Words, within Two years after the Words spoken, and not after.

Action saved.

The Right of Action in the Cases abovesaid, is saved to an Infant, Feme Covert, *Non compos mentis*, a Person Imprisoned or beyond Sea; so as they commence their Suits within the times above-limited respectively, after their Imperfections removed.

*Proviso for
bringing a
New Action.*

Provided also, That if in any such Actions Judgment be given for the Plaintiff, and the same be reversed by Error, or a Verdict pass for him, and upon Motion in Arrest of Judgment it is given against him; or if the Defendant be Outlawed in the Suit, and after Reverse the Outlary:

In these Cases, The Plaintiff, his Heirs, Executors, or Administrators, commence a New Action within a year after such Judgment Reverfed, or given against the Plaintiff or Outlary so reverfed, and not after.

Note,

Note, If one sue out an Original, or take out a *Latitat* within the time limited by the Statute ; it is a good bringing of the Action in due time, and he is not barr'd by the Statute, altho' he do not declare against the Party within the time limited by the Statute,

Statute prevented by Original or Latitat.

Pract. Reg. p. 10.

See 1 Keb. 181.

One may joyn two Debts due upon *Joining Actions.* two several Obligations in one Action, and so it is of the other Personal Actions; but it cannot be done in Real Actions. *Idem ibid.*

Vide there concerning Actions, and in *Touchst. of Prec.*, p. 24, 35.

Assault, Battery and Ejectment, both in one Declaration, *Touchst. Prec. 28.*

And the Rule is, That in Personal Actions one may joyn or comprehend *The Rule for Joining Actions.* several Causes or Wrongs in one Action or Writ, so as they be of one Nature, and against one Person, as *Debt* and *Detinue, &c.* may be joyned together, and one may bring One Action of Trespass for divers several Trespasses, done in divers places and at divers times; and it hath been held for divers Trespasses in the same place at divers time, *Co. Lit. 257. F. N. B.*

91.

So one Action of the Case may be brought for divers Promises; so of *Joining in Actions.* *Waft,*

Waft, for divers Wafts of divers Lands, and by divers Leafes. But Debt, and Trespass, and Wrongs of divers Natures, cannot be joyned together in one Action, tho' against one and the same Person, 8 Co. 87. 3 H. 4. 13. 11 H. 6. 18.

And it was held Error, where the Plaintiff in Debt for 3 l. 18 s. declared against the Husband and Wife for 39 s. upon the Wives Contract *dum sola fuit*, and 39 s. upon an *Insimul computaver* with the Husband only ; and the Plea was *Nil Debet*, and Judgment staid for the Errors, Hob. 258.

So if one declare against an Executor for one thing upon the buying of the Testator, and for another thing of his own buying, and say, That upon Account, the Executor being thus Indebted, promised payment ; this is ill : For the Defendant is to be charged in two manners, Hob. 120. pl. 115.

*Joining of
Persons in A-
ctions.*

Divers Persons may have an Action of Trespass joynly for Goods taken, or the like ; but of Battery, or such Personal Trespass, the Action ought to be single ; unless it be a Man and his Wife, and then you say, The Goods of the Husband only ; for the Wife cannot have property during Coverture. See *Touchst. Prec. 29.*

How

How Husband and Wife must sue, or be sued.

The Rule for this is :

The Wife can in no ways sue alone *How they may sue the Wife.* after the Marriage, nor be sued in any case without him for any thing she hath done ; except by the Custom of the City of *London*, for being Sole Merchant.

Yet it's said, If she be beat before or after Marriage, and the Husband die before Action brought, she may sue alone.

The Husband must sue alone ; where *The Husband.* he and his Wife deliver Goods, he must bring the Detinue, 8 Ed. 4. 14. So if a Promise be made to her, to pay him Money, 27 H. 8. 24.

See 37 *Aff. pl. 15.*

In Debt, for the Arrearages of an *Ac- Both.* count, they must joyn, *Plow. 418. 16 Ed.*

4. 8.

For Trespasses done to her before or *Both.* after Marriage, they must joyn ; except the beating the Wife during Marriage be such, that he lose her Company, he may sue alone, 20 H. 7. 5. *Pascb. 16 Jac. B. R. 5 Co. 16. 97. Dyer 805.*

9 Ed. 4. 52.

And yet it hath been said, That in *The Husband* all Actions wherein nothing but *Da- alone, or both.* mages are to be recovered, and the *Hus-*

Husband alone may release it, he may sue alone, or joyn with his Wife; but the safest way is to sue in both their Names.

If a Bond or Bill be made to them two during Coverture; or if an Account be made to her by her Receiver, while Sole: So where a Reversion is granted to them, and the Lessee break Covenant; so if he have a Lease for Life in her Right, and he make a Lease for Years, and the Lessee do Waft; so if the Wife have a Rent-Charge arrear before her Marriage: In all these Cases the Husband hath his Election, to sue with, or without his Wife, 20 H. 7. 5 Pascb. 16 Jac. B. R. 14 Jac. B. R. 5 Co. 18. 2 H. 4. 7. 38 H. 6. 3. 37 Aff. 11. 3 H. 6. 53. Pascb. 38 Eliz. B. R. Germy versus Longer.

How they must be sued. In some Cases the Husband may be sued without his Wife, as if during Coverture they both make a Bond, 43. Ed. 3. 10.

Husband sued alone. Both sued. If Goods be delivered to the Wife when Sole; so if he doth Waft in the Land he hath in her Right; so for Land he hath in her Right; so if she being Sole, make a Bond or Promise after Marriage; they must both of them be sued in these Cases, 39 Ed. 3. 17. 5 Co. 11. 52, 62, 75, Co. Lit. 13. Dyer 355.

And

And in all Cases where they are both sued, altho' the Husband may answer alone, yet the Wife shall never be forced to answer without the Husband; except being Sole Merchant, &c. 34 H. 6. 29. 40 Ed. 3. 34. 41 Ed. 3. 22. 2 R. 3.

15.

A Man marries with a Woman, Executrix to her former Husband; to which former Husband the Defendant was Indebted 100*l.* and promised the second Husband, *That if he would forbear him, &c. he would pay him the Debt.* In bringing the Action upon this Promise, he need not joyn his Wife with him, but must aver that she is alive,

2 Cro. 110. Yelv. 84.

See *Touchst. of Prec. 25.*See *Compleat Sollicitor, 334.*

How Executors, and Executors of Executors shall sue, and be sued.

See *Toucstone of Preced. 29.*See also *Wentworth's Executor.*

When Executors bring an Action, *The Rule.* they must all be named: But when an Action is brought against them, it must be only against such of them as do Administer, See *Noy's Max. 103. 22 Ed. 3. 19. 15 Ed. 3. 8.* and he that first cometh shall first answer.

Tenants

*How Tenants
in Common
must sue.*

Tenants in Common ought to joyn in Actions Personal; but not in those in the Realty: And in Assize and Slander of Title they ought to sever, 1 Inst. 195, 196. 7, 8. Yelv. 161. 23, 24. 2 Cro. 231.

*Tenants in
Common.*

In Ejectment upon a Lease made by Tenants in Common; it seems the Count is ill, and ought to declare upon several Leases; they should joyn in a Lease to another, and he to demise to another, who should bring the Action, and then all the Matter will come in Evidence, 2 Cro. 83, 166. 2 Rol. 719.

*Executor and
Survivor.*

A man by Bill sealed, acknowledges to have received of P. 40 l. to be equally divided betwixt A. and B. and to their use; the ones dies his Executor, and the Survivor ought not to joyn in an Action for it; but the Executor shall have an Action for one 20 l. and the Survivor for the other, Yelv. 23. 3 Cro. 729. VVinch. 127. Mo. 667.

*Parson and
Vicar.*

Parson and Vicar cannot joyn in an Action for Tithes, but the Farmer of their Tithes, tho' he claim by several Grants under them, so that both their Titles are conjoyn'd in one person, he may have one Action for Non-payment against several Persons in one Writ, Yel. 63. 2 Cro. 68. Mo. 914.

Two or more Plaintiffs may not sue *The Rule of joyning persons in Action.* in one Action for several Causes, tho' of the same kind ; and therefore two cannot joyn in one Writ, to sue upon two Bonds for Debt due to them, or to sue one man for Trespass : But if two or more have cause to have one Action; as if one Bond or *Affumpſit* be made to two, or more ; in this case they may and must sue all together.

And if two Men have more Lands and Goods together in Joyntenancy, and thereby wronged in it, regularly they must sue joynly in one Action for it ; and if they be Tenants in Common of Lands, in a personal Action, as for a Trespass, or the like Wrong , they must sue joynly ; but in a real Action they must sue apart, *Co. Lit.* 195, 196, 198.

Note, If one Trespass be done by *Trespass by divers.* divers, the Plaintiff may make it joyn, or several, as he pleases, *Co. Lit.* 231, 232. *Release to one is a Release to all.* And yet two that joyn in a Trespass do so make one Trespassor, that one of them is answerable for his Fellow ; and if they be sued in one Action, they may sever in Pleas and Issues : Yet one Jury must assess Damages for all ; but there shall be but one Satisfaction, and a Release to one will discharge them all : And as to Damages, he that is no party to the Issue shall have

have an Attaint as well as his Fellows; and if they be sued in several Actions, tho' the Plaintiff may make choice of the best Damages; yet if he take one Satisfaction, he can take no more; and if he doth endeavour it, an *Audita Querela* lieth, Hob. 91.

Concerning Audita Querela, and Scire facias.

Audita Querela is in nature of a Declaration; so is *Scire facias*.

Scire facias.

Nichils Return'd.

Infant inspected.

An *Audita Querela*, and a *Scire facias*, are in the nature of a Declaration; for they do set forth at large the Cause of the Plaintiff's Action, Pract. Reg. 93.

See more, who may have this, in *Compleat Sollicitor*, p. 246, 247, 248.

See concerning *Scire facias*, Pract. Reg. 297. and *Touchstone of Prec.* 254. See *Compleat Sollicitor*, 333.

In *Audita Querela* two Nichils ought to be returned, or a *Scire facias* upon a *Scire facias*; otherwise 'tis Error, 2 Cro. 59. Yelv. 88.

If an Infant brings an *Audita Querela*, and is inspected and has Judgment, and after the Judgment is reversed by Error; and after he comes of full Age, he shall not have an *Audita Querela* upon his first inspection, Yelv. 88. 2 Cro. 59. Con'.

If

If Judgment is given upon a *Scire facias*, upon a Recognizance acknowledged by an Infant; if upon an *Audita Querela*, the Recognizance is avoided by Infancy, the Judgment thereupon is avoided, *Yelv. 155. 2 Cro. 646.*

See more *Dyer 232, 333. 2 Cro. 208.*
1 Leon. 33, 140. Finch 35. a, &c. Co. Intr. 88.

The Court will make them enter up *Nul tiel Record*, so that they shall not ^{cord.} Plead *Nul tiel Record*. See *Mod. Rep.*

III.

An Infant Plaintiff ought to sue by *How an Infant* his next Friend or Guardian, and an Infant Defendant must appear by his Guardian, *1 Cr. 161. Hutt. 92. Compl. Soll. 334.*

Where an Infant Sues with others in *Infant Sues auuter Droit* as Executor, &c. here he shall *with others.* Sue by Attorney, for all of them together represent the Testator; but if Defendant, he must appear by Guardian, and so 'twas adjudged, *Trin. 21. Car. 2.*

Foxwift & al. Exec. &c. vers. Tremaym, This might upon a Demurrer (to a Plea in Abate-^{have abated if} ment, *Quia duo Quer. sunt infra AEtat.* ^{he had not} *& Narr' per Attorn.)* see *Yelv. 130. 5 Co. Sued in aueret* *29. 3 Cro. 377, 378, 541. Popk. 112. Resp.* *Ouster.*

*Ideot how to
be Sued, &c.*

By *Fortescue p. 33. H. 6. fo. 18.* an Ideot cannot sue by Guardian, nor next Friend, but in his proper Person; and who will Plead the best Plea for him, shall be admitted, *Dig. 13. 6.*

If a Man becomes *Non compos mentis*, If he be within Age, he shall appear by his Guardian; if of full Age, by his Attorney, *vide 4. Co. 123, 124, 125. Beverleys Case.*

The Rule for Persons who may Sue or be Sued.

*Who may Sue
or be Sued.
The Rule.*

Ideots, Madmen, and such as be Deaf and Dumb, or any other Man, Woman or Child, (except Persons disabled by Law,) being wronged, may bring the proper Action appointed for Remedy in that case.

And so on the other side, These may be Sued upon their wronging of others. *Persons disabled* Person Outlawed cannot Sue in any Action, whilst he doth so continue, *Co. Lit. 197.*

He that is Subject to a King that is an Enemy, cannot Sue, *Co. Lit. 198.*

So he that hath a Judgment given against him, upon a Writ of *premisse facias*, so long as the Judgment is in force. *Co. Lit. 199.*

He that is professed or entred in any Order of Religion, as Monk, Fryer, &c. so long as he continues so, Co. Lit. 200.

A Man Excommunicated till he is absolved.

But it seems that any of these disabled Persons may Sue in *auter Droit*, being Executor or Administrator to another, so far as is needful, to the performance of that trust: See *Wenworths Executor*, 21, 22, 23, 24, &c. Dyer 187, 275, 227, 371. 8 Co. 68. Co. Lit. 124. 125, &c. Dyer 77.

So he that is Attainted for Treason or Felony, or a Convict Recusant, or abjured the Realm, are disabled for the time he continues in that State; but in all those Cases, the disability being removed by Pardon, Reversal, Absolution, &c. the party may Sue again as before, Co. Lit. 128, 129, 29. A.B. 47. 7. H. 4. 39.

Rules concerning the Count or Declaration.

Wherein observe, That sometimes the Plaintiff or Demand may be abridged; as,

Where one bringeth an Affise, Writ *Abridgment of the Plaintiff or Demand.* of Dower or such like, wherein the Writ is general, without shewing any certainty; Though in the Declaration,

Of Pleas, &c.

the Plaintiff or Demandant is to shew the certainty of the Acres or parcels of Land. Then if the Tenant Pleadeth *Non Tenure or Joymenancy*, or some such like Plea, to parcel of the Land demanded in abatement of the Writ, the Plaintiff or Demandant may in this Case abridge his Plaintiff or Demand to that parcel and leave it out, and pray the Tenant may answer to the rest, 21 H. 8.Cb. 3. See Terms of the Law.

General Rules concerning the Count or Declaration upon Originals.

Count must be agreeable to the Writ.

1. The Count must be agreeable and conform to the Writ, as the Bar must to the Count, &c. and the Judgment to the Count, for none of them must be narrower or broader than the other, *C. Lit. 303.*

The Form.

2. The antient form of Counts are best to be observed.

Averment.

3. The Counts, or such as be in the nature of Counts, as Avowries, &c. need not to be averred.

Records alledged.

4. Where a matter of Record is the Foundation or Ground of the Suit of the Plaintiff, there it ought to be truly and certainly alledged.

But

But otherwise it is, where it is but the conveyance only.

A Count ought to have three certainties. *Certainties in the Count.*

1. Sufficient certainty, whereupon the Court may Judge.
2. Sufficient certainty, to which the party may Answer.
3. Sufficient certainty, upon which an Issue being joyn'd, the Jury may give Verdict, without being inveigled, *5 Co. 29. 3 Ed. 4. 21. (Plow. See Partridge's Case.)*

And note by the Stat. 36 Ed. 3. Cb. 15. *Substance.*
Declaration shall be good, if it have matter of substance; though the Terms be not apt.

The Count or Declaration is an Expression of the Writ, and addeth time place and other necessary Circumstances, that the same may be triable; and any Imperfection in the Count, doth abate the Writ, *Co. Lit. 103.*

Uncertain words may be made good and certain by the Defendants taking notice of the meaning of them, in his

Plea or Bar, *Pract. Reg. 305. 351.*

Where there is a Latin word in a Declaration, which is falsely Englished, the English word shall be adjudged void, and the Latin word shall stand, *Idem*

352.

Senseless words. Where senseless words which signify nothing, are used in a Declaration to express things, they shall be accounted void and idle, and shall not hurt the Declaration, if it be good without them,
Idem 352.

C H A P. II.

Of Pleadings.

Pleadings defined.

Pleadings largely taken, are all the sayings of the parties to Suits or Actions, after the Count or Declaration, as *Bar*, *Replication*, *Rejoyneder*, *Surrejoyneder*, *Rebutter*, *Surrebutter*, &c.

Order of Pleading.

They must be in order, *Ordine placitandi servato, servatur & Ius.* In good order of Pleading, First, a Man must Plead to the Jurisdiction of the Court. Secondly, To the Person of the Plaintiff, and next of the Defendant. Thirdly, To the Count. Fourthly, To the Writ. Fifthly, To the Action, *Braet. Lit. 5. fo. 400. Brit. fo. 41. a. & 122. Ca. Lit. 203.*

Imparience when and what

And after the Declaration, and before the Defendant can be compelled to Plead, many times there is an Imparience; which is a longer and further day given by the Court, and usually

usually till the first day of the next Term, upon a Petition made by the Tenant or Defendant, whereby he craveth respite. And this seemeth to be general or special.

Special, as where this or the like ^{Special Impar-}
Clause is inserted, (*Salvis omnibus lance.*
advantagis tam ad jurisdictionem
Curiae quam ad breve & narratio-
nem.) Kitch. fo. 200.

General, is consequently where that ^{General Impar-}
or the like Clause is not contained. ^{lance.}

And many times if the Defendant takes not his advantage before an ^{Advantage be-}
parlance, it is after quite lost, especial-
ly in the Cases following. ^{fore Imparlace}

1. Where the Plaintiff (being an Infant) doth not come by his Guardian.
2. Where the Plaintiff names not those that have right with him, as Executors, Joynt-Tenants, &c.
3. Where the Plaintiff sues in more names than he should, as naming the Husband and Wife, upon a Bond Sealed by them after Coverture, when only the Husband should be named.
4. Or where he sues with others, as are not in *Rerum natura*, or no such living.
5. Where the Plaintiff is Excommunicated or Outlawed.

E 4

6. Where

6. Where the Defendant can prove, that he made tender of the money at the day.

In all these Cases, the Defendant may take advantage the first Term, and Plead them before an Imparlane, but after Imparlane he cannot.

And Councils Hand must be to all such Pleas, as also to all other special Pleadings.

Uncore prift.

Uncore prift, i. e. adhuc paratus, and Pleas in Abatement, must be Plead the same Term the Declaration is of, without Imparlane, *Ed. Saund. Vide postea.*

Rule concerning Pleading before or after Impar lance.

Therefore after Imparlane, one may Plead in Bar, or to the Action; but one cannot Plead to the Jurisdiction, *misperit*, or to the Writ, or in Abatement of it, Except the thing happen after the Continuance, and it be abated, by the Death. See of this after.

Oyer of Deeds.

So neither then can the Defendant have Oyer of the Deed, except he Plead Variance, or that the Writ was brought in another County, &c. 7 H. 6, 16, 39. 38 H. 6. 7, 2. 39 H. 6. 22, 27, 18 Ed. 4. 19. 44 Ed. 34. See after.

*Venit & defen-
dit vim & injur
guando, &c.*

In Debt, Covenant, Account, Annuity, Detinue, Ejectment, Replevin, Second Deliverance, Case, Trespass, Trover, Assault and Battery, You make

make a full Defence and say, *Venit & defendit vim & injur' quando, &c.*

And so in all Cases, where you are to defend the wrong supposed by the Plaintiff; and is *faile* in substance if it be omitted, *Yelv. 210. vid. postea* Defence, &c.

The Rule is, That in real Actions, *Rule in this* when you Plead for the Defendant, to say, *Venit & dicit*; and in personal Actions, *Venit & defendit vim & injuriam quando, &c.* See *Compleat Solicitor*, pag. 227.

A Plea sometimes is taken more *of the Plea in particular* strictly for the Answer or Defence of the Defendant, to the Count or Declaration of the Plaintiff. And sometimes they be General and sometimes Special.

The General Pleas are such as,

Non Culpabilis.

Riens arere.

Nil Debet per patriam, and the like; these are by long usage fixt and known to all.

The special Pleas are manifold, as,

Per Dures,

Per Minas.

Pleas in Excuse, Justification, and the like, *Finch Ley 359. Plow. 343. Co.*

Lit. 303.

If the Defendant in any Action *plea called a Bar, and when* Pleadeth a Plea, which is a sufficient answer, and destroyeth the Action of the

the Plaintiff for ever ; it is called a Bar.

And this is distinguished into Bar to common intent, or at large ; and Bar special or material.

General Bar.

Bar to common intent is an ordinary and general Bar, which commonly disableth the Declaration , or shewing of the Plaintiff.

Bar Special Is that which is more than ordinary, and falleth out in the Case in question, upon some special circumstance of the Fact, as —

An Executor being Sued for the Debt of his Testator, Pleadeth, that he hath nothing in his Hands, the day of the Writ purchased.

This is a good Bar at the first Sight ; but the Case may be so, that more Goods may come to his Hands after, which if the Plaintiff can shew by way of Replication ; Then except the Defendant do alledge a more special Plea, he must be condemned in the Action, *Plow. 26. Kitch. 68. Co. Lit. 372.*

* *Special Bar.*

Bar perpetual.

Also some Bars are Peremptory or perpetual, and will for ever overthrow the Plaintiffs Action.

Temporary Bar.

And some are only Temporary which do only at the present overthrow, or interrupt the Action, but afterwards cease or fail : As *pleve Administravit* is a good Plea, untill it doth appear that more

more Goods are come to the hands of the Executors, *Bro. Bar.* 23.

See the Rules for the *Plea* or *Bar*.

Replication; what.

A *Replication* is an Exception of the *Replication de-second Decree*, made by the Plaintiff to *fined*.
the *Plea*, or *First Answer* made by the Defendant, *Vide Co. Lit.* 35. 304. 13 Ed. 1. ca. 36. *VWest. Symb. part 2.*

And great care must be taken, lest the *Replication* differ or vary from the *Count*, *Co. Lit.* 303, 304. and that it also maintain the Cause of the Plaintiff's Action: For if it appear by the *Replication*, that the Plaintiff hath no cause of Action, there he shall not have Judgment, altho' the Defendants *Plea* or *Bar* be insufficient in Matter, *Co. Rep.* 120.

And if it do differ or vary from the *Count*, and not make good the same, it is called a *Departure* in *Pleading*, which is not sufferable, *Co. Lit.* 31, 304, 305. *Plow.* 7, 8.

Also when the *Replication* doth neither confess and avoid, nor traverse the Matter of the *Bar*, it is naught, and the Plaintiff may demur to it, and shew this for Cause, *Vide New Book of Entries*, fo. 14.

See

See after for the Rules for a *Replica-*
tion.

Rejoyneder, what.

Rejoyneder.

The next Degree which follows the Replication, is a *Rejoyneder*, or an Exception to the Replication. See *West part 2. Symb. Sect. 56.*

See after for the Rule of *Rejoyneder.*

Surrejoyneder, what.

Surrejoyneder.

And the next follows a *Surrejoyneder*, or a second Defence of the Plaintiffs Action, opposite to the Defendants Rejoyneder, *West part 2. Symb. Sect. 57.*

And every one of these must be a sufficient Answer to the Matter objected by the adverse party, and follow and enforce the Matter offered by him, that did plead before.

And as the Replication must not differ from the Count, so neither must the Rejoyneder from the Bar, *Co. Lit.*

304.

See for the Rules, after.

Rebutter, and Surrebutter.

*Rebutter and
Surrebutter.*

Sometimes (tho' very rarely) the parties go so far in pleading, that it comes to a *Rebutter* and *Surrebutter*, before any Issue or Demurrer: As,

In

In Hill. Termi 1652. rot. 225. Scarbo-
rough versus Boyle, Action against the
Defendant, being the Son and Execu-
tor of his Father; and sets forth, That
another of the Father's Sons being In-
debted to the Plaintiff, *In cons. quod* 1. Count:
quer' desisteret prosequi Breve de Ne exeat
Regn' versus fil' Pater assumpfit dare satis-
faction' Quer' pro Debito, &c.

Defendant pleads Statute of Limita- 2. Plea.
tions.

Quod alias tulit breve original' & super- 3. Replication.
inde utlagat' fuit, Et postea utlagaria re-
vers', Et Quer' recenter tulit al' breve,
1 Cro.294. Jon.312. 1 Inst.282. Stil.440,
441.

Quod fuit Miles die Impetrac' Brevis. 4. Rejoyneder.
Adinde, *Quia comperuit per nomen Ar'*, 5. Estoppel.
&c.

Imparlace adinde & Rebutter. *

Quod tempore compareant' dixit, Quod fuit 7. * *Rebutter.*
Miles.

Quod dixit, Quod fuit Miles ; sed Quod 8. Surrebutter.
comparuit per nomen Armigeri.

Adinde, *Et pro Causis*, That the said 9. Demurrer,
Surrebutter of the said W. is superfluous,
and not formal, according to the usual
and legal Form of Pleading: And for
that also, That the said Surrebutter
is uncertain double and such as the
said R. can take no certain Issue upon,
&c.

— and Judgment pro Quer'.

Having

10. Joyneder in
Demurrer.

Having thus touched upon the several parts of Pleading, which may be orderly one after another (tho' rarely) in one Suit; I shall next enlarge upon the same, with many other Accidents and Incidents to Pleadings.

And first of Continuances, &c.

Continuance.

Thefore first¹, After a Suit is begun, and the party that is Plaintiff hath declared; he must continue his Suit from day to day, and from Term to Term, else the adverte party might take advantage of it; and that is called a *Continuance*; which is nothing else but the proroguing of a Suit from time to time, to keep it in being: And this is sometimes by the Act or Ordinance of the Court, and sometimes by the Act or Agreement of the parties, *F.N. B. 154. 7 H. 5. 39. Fincb's Ley 66.*

Dies datum.

When the Court doth give the parties further day and time, then it is called *Dies datum.*

Prece partium.

When the Continuance is by assent and agreement of both Parties, then it is said to be *Prece partium*, or *Ex assensu partium*.

Also there is a proroguing of a Suit by the Court, which is sometimes by Adjournment; as,

When

When any Court is dissolved, and de- *Adjournment,*
termined, and assigned to be kept *what.*
again at another place or time.

And this is sometimes by Impar-
lance.

And sometimes by Journies Accounts, *Journies Ac-*
counts. which is also a kind of Continu-
ance of a Suit begun, and inter-
rupted, *Bro. Default 34. Finch Ley*
67. 6 Co. 10.

And there is *Darrein Continuance*, *Darrein Con-*
which is the last day of the prorogati-
on of the Suit; and after this Continu-
ance regularly a man can plead nothing,
Kitch. 102, 199.

But see where 'tis in the discretion of
the Justices to allow or disallow, *2 Cro.*
261. Telv. 181. Observe after.

And if the Suit be not thus continu- *Discontinuance.*
ed, it will be Discontinued or Inter-
rupted; which being done, the Plain-
tiff is without day, and must begin his
Suit anew. So also if the Suit be
continued, but not well continued;
then it is a Miscontinuance, and pro-
duceth the same effect, as a Disconti-
nuance. *Miscontinuance.*

For by this the Suit will be determin-
ed, *11 Co. 38. Finch's Ley 431. Co. Lit.*
345.

And as the party may determine his
Suit negligently, as before; so also may
he end it wilfully, and that two ways;

i. Either

Retraxit.

1. Either by *Retraxit*; which is where the Plaintiff or Demandant cometh alone, or with the Defendant in Court, and saith, He will proceed no further; which will be peremptory and a perpetual Bar, and may be pleaded as a Bar to the Plaintiff in any other Action for ever.

Non-Suit.

2. By *Non-Suit*; which is, when the Jury is ready to appear, or to give up their Verdict; or, when upon a Demurrer a Day is given, and at that time the Plaintiff or Demandant being called, doth wilfully make default, and renounce his Suit after Appearance, 8 Co. 58.
10 Co. 135.

See more of these after.

Secondly, To the Plea, or Bar.

Pleas are divided into General and Special.

The General Pleas are well known, and many Books full of them, and so they are of Special; but if the Special Pleas have not been judged on in the Courts of *Westminster*, then they must be proved by the Rule.

Non

Non sum Informatus is a formal Answer of course made by an Attorney, that is commanded by the Court to say what he thinketh good in the defence of his Client, by the which he is deemed to leave his Client undefended; and so Judgment passeth for the adverse party.

But this properly is no Plea of the party, but an Excuse by the Attorney, and will save him Damages in a Writ of *Deceit*, if it should be brought against him.

Nil debet is a General Answer used to an Action of Debt without Specialty, whereby the Defendant doth alledge, that he oweth the Plaintiff nothing.

Not Guilty is a kind of Plea used to Actions of Trespass, or the like, whereby the Defendant doth absolutely deny the Fact wherewith he is charged; and as this is the General Answer in an Action of Trespass, which is an Action Criminal civilly prosecuted; so it is also in all Actions criminally followed, either at the Suit of the King, or other, wherein the Defendant denieth the Crime objected unto him. See *New Book of Entries*, Tit. *Non Culpabilis, &c.*

Riens arere, it is a kind of plea used to an Action of Debt upon Arrearages

Of Pleadings.

of Account, whereby the Defendant doth alledge, that there is nothing behind.

For these and such like, see the *New Book of Entries.*

Full Defence.

For in secum
placitum.

Ancient De-
mesne

Full Defence.

Most Pleas begin with a full Defence: *Ven' & defend' vim & injur' quando, &c.* (Co. Lit. 127.) i. e. *Quando, Ubi, & Quomodo Cur' videbitur.* Observe more hereafter.

There is also a Plea called a *Forein Plea*; which is, when the Defendant doth plead such Matter, that if it be true, the Cause cannot be tried in that Court. As to an Action in the Marshal Court, the Defendant pleads, That the Cause of Action did arise and accrue within the City of *London* out of the Jurisdiction of their Court; and so of the like.

Also to plead the Lands in question are Ancient Demesne, and ought to be pleaded in the Court of the Man-
nor of which they are holden, and demand Judgment, if the Court may hold plea of them; and if they so be, this will abate the Writ before, or after Answer. *F.N.B. fo. 14. d. 128. a. & fo. 4. B. C.*

But Note, That though this Plea may be pleaded after Imparlane, yet it hath been held, That if the Defendant make a Full Defence, he cannot after

after that plead to the Jurisdiction of the Court. See *Stile's Pract. Reg.* pag. 244.

And in regard by a Forein Plea, the Defendant doth refuse the Judge as Incompetent, because the Matter in hand is out of his Precincts, and thereby doth endeavour to hinder the Proceedings of the Court, and to delay the Plaintiff; therefore the Court doth usually make the Defendant swear his Plea to be true, or else enter up Judgment for want of a Plea, *Stile's ibid.* & p. 233. See *Kitchen, fo. 75. 4 H. 8. 2. 22 H. 8. 2, 14.*

It is also a Forein Plea, when any Felon pleadeth the Matter to be done in a Forein County, whereof the Judge (before whom he is tried) may not have Conuance, but must be tried in a Forein County. See *Terms of the Law.*

There is also Double Plea.

As where the Tenant or Defendant pleadeth such a plea as containeth two ^{Double Plea} ~~what~~ Matters, either of them being a sufficient Bar to the Action: Which the Court will not admit, though some think it ought the rather to be admitted; because a Man may have two good Defences, and perhaps in the Issue he shall fail in proving the one, and yet be able to carry the Cause by the other, See *Cow. Interp. Tit. eod.*

Sir Tho. Smith (in his *Repub. Ang'*, Lib. 2. Cap. 13.p.57.) supposeth the Reason, why the party having two Defences or peremptory Exceptions, as he calls them, shall be compelled to choose one of (them and if he fail in that by the Verdict of 12 Men, he shall lose his Action and Cause) is, because the 12 Men be commonly rude and ignorant ; and so consequently, not to be troubled with over-many things at once.

Not to be allowed.

However it is, This Double Plea is not admitted in the Common Law, nor by the Court ; but the Defendant shall be put to amend it, unless they be such as one of them do depend upon the other ; and then, if he may not have the last without the first, both may be admitted. But when the Issue is taken by the Plaintiff upon the one , he cannot have the advantage of the Insufficiency of the Plea ; for then he hath waived the other, *Kelw. 37. 11 Co. 52.*

So if he Demur , and shew it for Cause, and the Defendant joyneth in Demurrer , he loseth his advantage of Amending, &c.

*Rules to know
a Double Plea.*

I.

Therefore it is well to be observed, when the Plea is double , and when not : For if a man alledge several Matters, the one nothing depending on the

the other, the Plea is accounted double; if they be mutually depending one on the other, then it is accounted but single, *Kitch. fo. 223, 224.*

Stile's Pract. Reg. p. 236. faith, a Double Plea is such a Plea, that one Issue cannot determine all the Matter issuable that is contained in it; and also where the Defendant is put to a double Answer; and such a Plea is not a good Plea.

Again he says, (*Page 234.*) Although a Plea do contain divers Matters in it, upon which an Issue may be taken; yet this Plea is not double, if the Plea could not have been good without alledging all those Matters in it.

For though the Law doth not allow Captious Pleas; yet it doth not deny the Defendant to plead all such Matters that this Case affords for his just defence.

And, (*Page 246.*) If one be compelled to alledge double Matter in his Plea; yet if he do insist upon one of them, the Plea is not double.

For upon that Matter upon which it is insisted upon, shall Issue be joyned.

Where there is but one Tenant, or one Defendant, he cannot have two such Pleas as each of them do go to the whole; but where there are di-

Of Pleadings.

vers, each of them may plead several Pleas, which extend to the whole, Co. Lit. 303.

Protestando,
what.

Therefore to prevent this Double Pleading, they make use of a Protestation; which is a defence of safeguard to the party, which maketh it from being concluded by the Act he is about to do, that Issue cannot be joyned upon it, Plow. 276. b. Regist. Orig. fo. 306. b. See Cowel's Int. Tit. eod.

But more clearly, *Protestation* is an Exclusion of a Conclusion, that a party to an Action may by pleading incur; or it is a Safeguard to the party, which keepeth him from being concluded by the Plea he is to make, if the Issue be found for him. See Co. Lit. fo. 124.

This *Protestando* is a Form of Pleading, where one will not directly affirm or deny any thing which is alledged by another, or by himself; And it is in two sorts.

Rules concerning the Protestando.

I. One, when a man pleadeth any thing, which he dare not directly affirm; or that he cannot plead, for fear of making his Plea double; as if in conveying to himself (by his Plea) a Title to any Land, he ought to plead divers Descents by divers persons, and he dare not affirm, That they

they were all seized at the time of their Death ; or although he could do it, yet it will be double to plead two Descents, of both which every one by himself may be a good Bar. Then the Defendant ought to plead and alledge the Matter , interlacing the word *Protestando* ; as to say (by *Protestation*) That such a One died seized, &c. and that the adverse party cannot Traverse.

2. Another is, when one is to Answer to Two Matters, and yet by the Law he ought to plead but to one ; then in the beginning of his Plea, he may say *Protestando & non cognoscendo*, such part of the Matter to betrue, (and then making his Plea further) *Sed pro Placito in hac parte, &c.* and so he may take Issue upon the other part of the Matter ; and then he is not concluded by any of the rest of the Matter he hath by Protestation so denied , but that he may afterwards take Issue upon it.

See *Terms of the Law.*

See also *Finch's Ley 359.*

There is also (or especially hath been) Falsa Placit', what. a sort of Pleading, called *Faint Pleading* ; which signifies a false, covinous, or collusory manner of pleading to the Deceit of a Third party. See 34, & 35 H. 8. ca. 24.

Of Pleadings.

And it seems, That formerly Fines were taken by Sheriffs, Bayliffs, &c. in the County Courts, and Courts Baron, upon such Pleadings (by way of Licensing them :) Therefore by the Statute of *Marlebridge*, 52 H.3.cap.11. the Writ *Beau-Pleader* was given; This Writ lies (saith *Fitzb.* in his *Nat. Br.* fo. 270. A. B. C.) where the Sheriff, or other Bayliff in his Court, will take Fine of the party, Plaintiff or Defendant, for that he pleadeth not fairly; and this Writ is to forbid them to take such Fine.

The Statute provideth, That neither in the Circuit of Justices, nor in the Counties, Hundreds, or Courts Baron, Fines shall be taken of any man, &c.

See one Case of Collusion in *Regist.* *Orig.* fo. 179.

Colour defined.

Colour in Pleading, signifieth in the Common Law a probable Plea, but in truth false, and is to the end to draw the Tryal of the Cause from the Jury to the Judges. See *Terms of the Law*, Tit. eod. See *Brook. Tit. Colour* fo. 64. 140, &c.

This Colour is a fained matter, which the Defendant or Tenant useth in his Bar, when an Action of Trespass, or an Affise is brought against him,

him, in which he giveth the Plaintiff or Defendant a shew at the first sight, that he hath good Cause of Defence; and is to the end to bring the Action from the Determination of the Jury, to the Determination of the Judges: It is therefore always of a matter in Law, and that which may be doubtful to the Common People. See *Cow. Int. verb. eod.*

As in an Action of Trespass, for taking away the Plaintiffs Beasts; The Defendant Pleadeth, that before the Plaintiff had any thing in them, he himself was possessed of them, as of his own proper Goods, and delivered them to *A. B.* to deliver to him again, when, &c. and that *A. B.* gave them to the Plaintiff, and the Plaintiff supposing them to be *A. B.*'s, took them of him as a Gift; and the Defendant took them from the Plaintiff; whereupon he hath brought the Action; This is said to be a good Colour. See *Doct. & Stud. L. 2. Cba. 43.* See 10 Co. Doctor Leyfelds Case, and there 'tis laid.

1. That Colour shall not be given where it goeth to the Bar of the Right, for it would be in vain to give Colour of Right, and to Bar him, if he had Right; as if a Collateral Warranty, Fine, Statute, &c. be Pleaded, or if he claims

Rules concerning Colour where to be given and where not.

Of Pleadings.

claims by a Wife : Othewise where he Pleads a descent, for this doth not Bar the Right, but the Possession ; he who claims by Sale in a Market overt, shall not give Colour if he Pleads generally : But if he Pleads, that *J. S.* was possessed as of his own Goods, and sold them in a Market overt, or waived them, There he shall give Colour, because he confesseth no interest in the Plaintiff.

2. If the Defendant claims by the Plaintiff, he shall not give Colour.

3. If the Plea be to the Writ, or Action of the Writ, no Colour shall be given.

4. Colour shall not be given in Cases of Tithes ; for to whomsoever the Lands belong, the Tithes belong to the Parson.

1. Colour ought to be a doubt to the Lay Gents.

2. It must have continuance.

3. It must be such a Colour, That if it be effectual, will maintain the Action.

4. It ought to be given by the first Conveyance.

And by *Brook* 64 & *petit Bro.* 53.

1. That Colour ought to be matter in Law, or doubtful to the Lay People.

2. It

2. It behoves, that Colour be such, so that if it be true, that of such Possession the Plaintiff or Defendant may have their Action.

3. He which justifies as Servant, and conveys Title to his Master, shall give Colour.

4. Colour by Possession in Law is good.

1. Colour shall not be given to one, who is mean in the conveyance, but to the Plaintiff.

2. Shall not be given to a Stranger who enfeoffed the Plaintiff; nor shall be given to the Defendant.

3. It shall not be given by a Possession determined; so where it appears in the Pleadings that the Possession is determined, shall be given by an Estate defeated.

4. Where the Defendant binds the Right of the Plaintiff by Feoffment, with Warranty, Release, Fine, Recovery, Distress and Re-entry and the like; There needs not any Colour.

5. He which lays no property in the thing, but takes it as a Distress, and the like, shall not give Colour.

6. Colour shall not be given, but upon a Plea in Bar.

7. Colour shall not be given but by him, by whom you commence your Title, and not by a mean in the conveyance.

8. He

8. He which Pleads to the Writ, shall not give Colour.

There is also Colour express, and Colour implied; but see more of this after, where in part of an Argument set down, these two differences are explained.

*Dilatory and
frivolous Plea.*

And where the Defendant pleads a Dilatory and Frivolous Plea, to the intent to delay the Plaintiff, and to hinder him from going to Tryal; The Court will upon the Plaintiffs motion, order the Defendant to Plead such a Plea as he will stand to, or else to accept of a Demurrer unto his Dilatory and frivolous Plea; and if he do it accordingly, and such his Plea be not good, the Court will not after permit him to amend it, *Stiles Reg. 234, 237.*

Rules concerning a Dilatory.

A Plea in Abatement is only Dilatory, and is not to bring the matter in question to an Issue, but to delay the Plaintiff.

And if such a Plea be over-ruled, there shall be a *Respondeas Ouster*, that is, the Defendant shall be ruled to put in a better Plea.

But upon over-ruling of a Plea, which is Pleaded in Bar of the Action, Judgment shall be given against the Defendant, for such a Plea is peremptory, *Idem 242.*

But

But if it be doubtful between the Parties, whether a Plea be good or not, it cannot be determined by the Court upon a motion made, that the Court would deliver their Opinions, whether it be good or not; But there ought to be a Demurrer upon the Plea, and upon hearing of Arguments thereupon, the Court is to judge, whether the Plea be good or bad, *Idem 244.*

A Dilatory Plea ought to be Plead upon giving the first Rule in the Office for the Defendant to Plead; and a Plea in the chief, must be Plead after the second Rule given to Plead.

And this is the reason, That Judgment cannot be entred against the Defendant for want of a Plea, until the time given by the two Rules to Plead be past, *Idem 242. Mich. 24. Car. B. R.*

A Dilatory Plea upon a Demurrer is not peremptory, but it is otherwise upon an Issue joyned, *Idem 241.*

If one Plead a Plea that is not good, *Ill Plea.* and the Plaintiff doth Demur upon it, he cannot afterwards amend that Plea without the Plaintiff's consent; for the Defendant shall not take advantage of his own ill Pleading, *Idem pag. 243.*

Traverse.

Traverse what. Many times it is necessary to Traverse something charged in the Declaration, &c. which is no more than to deny it to be true, in these words *Absq; hoc, &c.* Kitch. 140, 227.

And sometime it is of the Matter.

Sometime of the Manner.

Sometime of the Day or Year.

And sometime of the place. Observe after.

*Rules for the
Traverse.*

If one will take a Traverse to a Declaration, he ought to Traverse that part of it, that the doing thereof will make an end of the Matter, for which the Plaintiff declares, and then is the Traverse good, *Pract. Reg. 318.*

So where there is a Disseisin, and a Descent alledged in a Declaration, if the Traversing of the Disseisin will make an end of all the Matter, there the Disseisin is to be Traversed, and not the Descent; that is in such Cases whereby Supposition, the party may come to the Estate by Disseisin, *Idem 318, 319.*

Where the Defendant hath confessed and avoided all the Matter that is contained in the Declaration, there he need not to take a Traverse, for this is a full answer of the Matter alledged, *Idem 319.*

So

So where the Defendant hath given a particular answer in his Plea, to all the material Matters contained in the Declaration, there he needs not to take a Traverse, for a Traverse is a denial of a thing, and when a thing is answered, there needs no denial, *Idem* 138.

The consideration in an *Affumpſit* is *Consideration* not Traversable, but the general If not *Traversable* sue must be Pleaded, and the consideration given in Evidence, *Het.* 59. But see 1 *Cro.* 201. 250. 373. *Hob.* 128. where 'tis said it may, if it be Executory.

Averment.

Sometimes there must be an *Averment*, which is a profer to make out or justify something necessary to maintain the Bar, and disable the Plaintiff's Action: And tis divided into general and particular.

General Averment is the conclusion *General.* of every Plea, Bar or Replication; and other Pleadings containing matter affirmed, ought to be averr'd, *Et hoc paratus est verificare, &c.*

Particular Averments are, as when *Particular.* the Life of the Tenant for Life, or Tenant in Tail are averred, or that the persons or places in the Count and Bar,

Pleadings.

Bar, &c. are the same, Co. Lit. 303, 362. a.

Counts and Avowries in nature of Counts need not be averr'd, Ibid. 303. Br. Averment 81. See after.

I have hereunto put an Argument made by an Excellent Lawyer of these times, wherein are touched many things concerning Averment, with other special remarks in Pleadings.

Lewknor against Mountague the Father, sur Obl' wherein W. M. the Son, and W. M. the Father, were bound with Condition.

Narr'.

That if the above-bounden William Mountague, do and shall from henceforth, &c. absent, &c.

Plea.

Defendant pleads, *Quod pred' W. M. a tempore confectionis, &c. absentavit, &c.*

Repl'.

Plaintiff Replies, and shews the whole Matter and Circumstances, and how that Bond came to be made, &c. and then avers, That *William Mountague Junior*, is the said *VVilliam* mentioned in the said Condition, *& quod non absentavit, &c.* But, &c. and avers, That the Obligation in the *Narr'* and the Obligation in the *Repl'*, is the same, &c.

Estopple.

Defendant says, The Plaintiff ought not to say so, because it appears to be an Averment against the Condition of the Bond, &c.

Plaintiff

Plaintiff demurs, for cause, That the Demurr^r. Defendant has not answered the Plaintiffs Replication, and does not confess and avoid, or traverse the Matter in it; and also, for that the Matter of the Rejoynder is insufficient in Law.

Defendant joyns in Demurrer.

Upon this pleading the Question is,

VVhether the Plaintiff be estopped, to take The Question, such an Averment as he has done, That William Mountague Junior, is William Mountagve mentioned in the Condition?

The use of an Averment, is to ascertain that to the Court, which is generally or doubtfully alledged, that so the Court may not be perplexed of whom, or of what it ought to be understood.

And a man shall never be estopp'd from making such an Averment, for ascertaining the intent of the Parties, if it be not utterly inconsistent with the Deed: For an Estoppe being to conclude a man from speaking the Truth, must be certain to every intent, it shall never be taken by Argument or Inference, *Co. Lit. 352. b.*

And therefore, if there be any uncertainty in the Consideration of a Deed, or in the Thing granted, or in the Person to whom the Grant is made; the Law has allowed an Averment, to make this certain.

If the Consideration in a Deed be defective, it may be supplied by Averment. As,

*1 Co. 176.
Mildmay's
Case.
Leo. 170. Smith
and Lane's
Case.*

If a Bargain and Sale be made generally, for divers good Considerations, so that (as the Deed stands) no Use can arise; yet the Bargainee may supply that by averring, That Money was paid.

If *A.* Covenants with *B.* to stand seised to the use of him and his Heirs, no Use will arise for want of a Consideration; but *B.* may aver, that he is of the Blood of *A.* and that the Covenant was made for the Advancement of his Blood.

Tho' there be an express and particular Consideration mentioned in the Deed, yet another Consideration may be aver'd, so it be not contrary to the Deed.

*Dyer 146.
4th Co. 3.
7th Co. 40.
Bedell's Case.*

G. P. and *J.* his Wife have Issue *W.* who has Issue *R. G.* & *ux²* by Indenture, in Consideration of 70*l.* paid by *C.* bargain and sell to *C.* for 30 years, Remainder to themselves *pro vita*, Remainder to *William pro vita*, Remainder

der to *Richard*, and one *Collet* the Daughter of C. in Tail; and a Recovery is had to the same uses. Though there be no mention made of any Marriage or Joynure, yet it may be averred, That the Indenture was made in Consideration of a Marriage between *Rich.* and *Collet*, for a Joynure for *Collet*, because it consists well enough with the Deed, that there might be another Consideration besides what is mentioned in it.

In like manner if there be any uncertainty in the Thing granted by a Deed, that also might be help'd by an Averment.

As if a Fine be levied of the Mannor ^{3 Co. 155. a.} of *Sour*, and there are two Mannors, ^{Edw. Altham's Case.} *North Sour* and *South Sour*, the party may aver which Mannor the Conusor intended to pass; for this is a matter of Fact, which may stand with the Fine, and shall be tried by a Jury.

And as the Consideration of a Deed and Thing granted by it may be made certain by averment; so if there be any ambiguity or uncertainty touching the person, by reason he is only generally named or designed, an Averment shall make that certain.

Of Pleadings.

A man devises Land to his Son *John*, and he has two Sons of that Name ; the youngest Son may in pleading aver, That the Devise was meant to him, See *Peynell's Case*, 47 Ed. 3. 16. b.

And yet the Statute of *Wills* requires, That a Will concerning Lands should be in Writing : And the Rule of Law is, That the Construction ought to be collected out of the words in Writing, and not by Matter *dehors*.

² Leon. 35.
³ Leo. 79.

So if a Will contain no more than these words, *I devise my Lands to A.* and the Name of the Devisor is not in the Will, yet the Devise is good ; and both the name of the Devisor, and the Lands devised, shall be made out by Averment.

The Law does so favour the intent of the parties, that it will in some Cases allow a Deed to be expounded differently, from the ordinary and most natural import of the words, if it be averr'd, That the parties did intend such a Construction should be made.

A Bond bears date the 23^d day of *May*, and is to pay Mony on the 24th day of *May* next ensuing : The Book says, It was agreed by the Court, That the natural and proper construction was to make the words [Next ensuing] relate

relate to the Day, and so that the Roll's *Tz.*
 Money was payable the day following *Parol.*
 the date of the Bond. But yet if it *Buckley vrs.*
 be made appear that the intent of the
 parties was, That the Monies should
 not be paid till the Year following,
 the Court will expound the words ac-
 cordingly. *Hillbank 251.*

And to this purpose the Case of *V Vel Hob. 269.*
don and Wilkinson seems yet stronger;
 for thiere the words of the Condition
 were interpreted by Averment of mat-
 ters *debors.*

That which seems to be the only Ob- *6 Co. 20.*
 jection to the Averment in the present *Objection.*
 Case is, That where there is a Father
 and a Son of the same Name (as here;) if
William Mountague be named genera-
 lly, it shall be intended to be *V Vil-*
liam the Father.

And it is true, generally speaking,
 the presumption of the Law is so; but
 it is such a Presumption as shall stand
 so long only *dunc probatur in contra-*
rium.

The very same Book which says, *6 Co. 20.*
That where J. S. is named generally, it Gregorie's Case.
 shall be intended J. S. the Father; says
 in the same place, *If there be two Bro- Respons.*
thers called J. S. and J. S. be named gene-
rally, it shall be intended of the Elder;
so that the presumption of the Law is the
same as in the case of the Father. And

yet my Lord Cheyney's Case, and in *Peynell's Case*, which have been mention'd, it was solemnly settled, that against that general Presumption, it might be averr'd that the younger Son was intended.

In *Hind's Case*, where the Plaintiff shews, That a Deed was Inrolled *Termo Pasch. 20 Eliz.* the presumption of the Law is, that it was Inroll'd the first day of the Term. But tho' this be the general presumption, and Matters of Record are of so high a nature, that all persons are concluded to deny what appears there; yet the Defendant shall be admitted to aver, That the Deed was not Inroll'd till such a Day in the Term.

So that this general Presumption of Law works no Estoppel; the parties are at liberty to shew the contrary, as it was in that Case! If it were otherwise great Inconveniences would follow; whereas there is no inconvenience by allowing the parties to make the Truth appear.

See the Construction of the word *Seniori pueru* in a Fine levied, where the Daughter was allowed to aver, That the intent of the Conusor was not to restrain it to the Male-Child, but generally to the Eldest Child, and that she was elder than the Son; and this

*4 Co. 71.
Hind's Case.*

*Hob. 32.
Mo. 105.
Lane against
Cooper.*

this Averment was agreed on by the Court, though the word *Puer* in construction of Law signifies a *Sun*, and so shall be expounded, unless the Intent of the parties be made out to be otherwise; yet in this case, the party was allow'd to explain the word to another meaning.

The Cases make it plain, That though the Law would presume a thing to be so, in case there were nothing else appear'd, yet this shall not estop the party, to shew what the true Intent of the parties was, because (according to the Rule before-mentioned) it must not be Argument or Co. Lit. 352. Inference from any general intendment of Law which shall make an Estoppel; but a direct and precise Certainty only.

That which seems strongly to prove, That this Presumption of Law has no longer place, than till the party concern'd shews something to take it away, is the Case of *Stubbs and Coke*: Co. Jac. 623. Where *Stubbs Junior* brought an *Indemnitate nominis*, alledging and averring, That the Sheriff endeavoured to levy Damages, &c. upon him, when as the Suit was against *Ralph Stubbs Senior*; and so prayed to be discharged, and the Writ was allowed upon debate: Which it could not have been

if the Presumption of Law had been so strong, that it could have been none other (tho' no Addition) than *Ralph Stubbs Senior*; neither would the Averment have been suffered, but he must have taken his Remedy by an Action of false Imprisonment.

It is to be observed, That the Reason given why, when a person is mentioned without an Addition, it shall be understood and presumed to be the Father, or the Elder Brother, is, because he is the most notorious person; but if there be any thing appears upon the face of the Deed, which shews, that the most regard is not had to him, but to the other person, that Presumption seems to be taken off.

Now it appears upon the face of this Bond, That *William Mountague Junior* is the person first named, which being so directly contrary to the usual and natural Order of placing persons in Deeds, makes a Presumption, that *William Mountague the Younger* was the person chiefly regarded in the business, and was the Principal in the Bond, and was the person concern'd in the Condition.

'Tis true, in strict speaking, the Defendant cannot be said to be a Surety only; (so as to have a Writ *De plegio acquisi-*

acquietandis, according to the Cases in Dyer) because that kind of Surety is Dyer 370. now disfused totally ; yet the person first named in the Bond is always look'd upon as the Principal ; that is, as he whose proper Debt it is, and is so generally called ; and the Law takes notice in point of Construction, of what is become the General Practice and Usage of the Kingdom. So that as there is a Presumption on one hand, that the Father is meant, because there is no Addition ; so on the other hand there is a strong Presumption, that the Son is the person concern'd ; and that as he is the first person bound in the Obligation, so the above-boun-
den *William Mountague*, in the Con-
dition, relates to him, or otherwise he had not been named in the Bond be-
fore his Father.

1. Upon the whole Matter , where there is a person named in the Deed, and it appears that there are two of that Name , an Averment shall make it certain which of these two was meant.

2. That tho' if the Matter stood only upon the Deed, the Presumption of Law would understand by *W. M. William Mountague* the Father ; yet the parties are not estopp'd to shew the Truth,

Truth, and to ascertain by an Averment, which of the two was intended by the parties.

3. That as this Case is, the Averment is well made, and the Matter in the Replication does fully and clearly introduce it.

If there should be any Objection made, as to the assigning of the Breach, because the Condition is, *That he shall forbear to come into the Company of Jane, or to write Letters to her:*

And the Breach goes onely as to his coming into her Company, but says nothing as to his Writing Letters; and that unless both be done, the Condition is not broken.

The Answer seems to be plain :

First, Because the Intention of the Parties is apparently otherwise.

Secondly, It is true, in some Cases copulative Words shall be taken disjunctively, and disjunctive Words copulatively; but never, unless some necessity does require it, or some absurdity would otherwise follow. But here the Intent of the Parties does agree with the genuine construction of the Words; for the Verb [*Forbear*] is but once used, and does equally relate to the *Writing Letters*, and *Coming into the Company*: And the word [*Jane*]

[*Jane*] is but once used also ; so that [*If he shall forbear to come into the Company of, and to write Letters to the said Jane*] can have no other meaning, than that if he shall forbear both the one and the other ; so that if either be not forborn, the Condition is broken.

If an Objection should be made , That in the assigning the Breach more is alledged than what is necessary , because it is said, *He came into her Company, and had her Company at Bed and Board* ; whereby the Defendant is drawn to take more into the Issue than what is necessary.

The Answer seems to be, That this Matter is but an Instancing , in what manner he had her Company ; and at most is but Surplusage, which will not vitiate the Replication, nor put any necessity upon the Defendant to Answer it.

If the Condition of a Bond be, That *A.* shall not Assault *B.* If *B.* assigns for Breach, That *A.* did Assault and Beat him ; this will not make the Pleading ill, and shall be only Surplusage, as to the alledging of the Beating.

Per Summers.

Modo

Modo & forma. *Modo & forma* are words used in Pleading, and sometimes they are only Formal, and sometimes they are Material. These words are mostly used in the Answer of the Defendant, whereby he denieth himself to have done the Thing laid to his charge, *Modo & forma declarata.*

See *Kitch. fo. 232.*

Observe after, when necessary, when not.

Quæ est eadem.

Quæ est eadem are also words of Art, used in Pleading, and commonly in a justification of a Trespass, &c. which the Defendant saith is the same Trespass, the same Imprisonment, the same Beating, &c. complained of in the Declaration, 2 Cro. 372.

Example.

In an Action of the Case, the Plaintiff saith, *That the Lord threatened his Tenants at Will in such sort, as he forc'd them to give up their Tenures.*

The Lord for his defence pleadeth, *That he said to them, That if they would not depart, he would sue them as the Law would:* Which is the same Threatning, &c. *Kitch. 226.*

Where these Words are necessary, and where not, see after.

Uncore prist.

Uncore prist is a Plea for the Defendant, being sued for a Debt due at a Day past, to save the Forfeiture of his Bond, &c.

Saying,

Saying, That he tended the Debt at the Time and Place, and that there was none to receive it; and that he is now also ready to pay the same, 7 Ed. 6. 83. Dyer. Vide *antea* 56, & *postea*-tit. *Tender*.

Son Assault demesne, This is a Plea in Son Assault an Assault and Battery, which is, when a man justifies, That the Plaintiff struck the first Blow, and that he (the Defendant) struck in his own defence.

This is a very useful Plea, and proves very often on the Defendants side.

See *Compleat Solicitor* 217.

Que Estate, or *Cujus statum*, it is a *Que Estate, or* manner of Pleading in a Plea or Count, *Cujus statum*. or elsewhere, whereby a man Entitling another to Lands, &c. saith, *That the same Estate that that other had, he now bath from him*. See *Bro. Tit. Que Estate*.

'Tis said for Law, That if a man *covers Land from J. S. or disseises it*. *Who shall plead* *J. S. he may plead*, That he hath his Estate, and yet he is in the *Post*, *Idem* 48.

'Twas agreed, That a *Que Estate Not to one that shall not be allowed in one who is mean in the Conveyance*; as to say, *That A. was seized in Fee, and enfeoffed B. whose Estate C. bath, who enfeoffed the Defendant*; for the *Que Estate* shall be allowed only in the Defendant, or Tenant himself, *Idem* 49.

Note

*Note of a particular Estate,
&c.*

Note also, That 'twas agreed by the Justices, That a man cannot convey an Interest by a *Que Estate* of a particular Estate, as Tail, for Life or for Years, without shewing how he hath this Estate, be it of the part of the Plaintiff, or Defendant, *Idem* 31.

Negativa pregnans, that is, a Negative *pregnans, what, and when.* Plea, implying also an Affirmative.

As if a man being impleaded to have done a thing upon such a Day, or in such a Place, denieth that he did it *modo & forma declar'*; which implieth nevertheless, that in some sort he did it.

Or if a man be said to have alienated Land, &c. in Fee; he denying, that he hath alienated in Fee, seemeth to confess, that he hath alienated in some other sort. See *Dyer fo. 12. nū. 95.*

See *Brook hoc Titulo & Kitch. fo. 232.*

The Civilians have also *Affirmativa pregnans*, which implies a Negative.

See *Cow. Int. verbo Negat' pregnant.*

Observe after.

Nient Comprise, what, and when.

Nient Comprise, is an Exception taken to a Petition as unjust, because the thing desired is not contained or comprehended in that Act or Deed whereupon the Petition is grounded. For Example, One desireth of the Court, to be put in possession of a House formerly among other Lands, &c. adjudged unto him.

The

The adverse Party pleadeth, *That his Petition is not to be granted, because though he had a Judgment for certain Lands and Houses, yet the House into the possession whereof he desireth to be put, is not contained among those for the which he had Judgment.*

See *New Book of Entries*, Tit. eod.

This seemeth to be especially to hinder Execution.

See *Cow. Int.* Tit. eod.

Non-ability is an Exception taken against the Plaintiff or Demandant upon *how*. some Cause, why he cannot commence any Suit in Law, as *Premunire*, *Outlary*, or *Excommunication*; or because he is a Stranger born, &c. *Fitz. N.B. fo 35. a. 65. d. 77. c.*

And by some there have been reckon'd six Causes of *Non-Ability*; as, 1. *Outlary*, 2. *Stranger born*, 3. *Profession in Religion*, 4. *Excommunication*, 5. *Villenage*, and 6. *Præmunire*.

Yet its said, the second Cause holdeth only in Actions Real or Mixt, and not Personal.

See *Cow. Int. verb.* *Non ability.*

Non-Claim seemeth to be an Exception against a man, &c. that claimeth *what*. not within the time limited by Law, as within the Year and Day, in case where a man ought to make continual Claim, or within Five years after a Fine levied,

levied. See 4 Co. & Cow. Interp. verb. eod.

Non compos
Mentis, what
and whs.

Non compos Mentis is of four sorts: First, He that is an Ideot born; Next, He that by Accident afterward wholly loseth his Wits. Thirdly, A Lunatick, that hath sometime his Understanding, and sometime not. Lastly, He which by his own Act depriveth himself of his right Mind for a time, as a Drunkard, 4 Co. 124.

Non Culpabilis.

Non Culpabilis, Vide antea p. 65. & postea.

Non est factum.

Non est factum; Vide postea.

Non-Suit,
what.

Non-suit is a Renunciation of the Suit by the Plaintiff or Demandant, when the Matter is so far proceeded in, as the Jury is ready at the Bar to deliver their Verdict, Anno 2 H. 4. c. 7. See New Book of Ent. verb. *Non-suit*, &c.

Non-Tenure,
what.

Non-Tenure is an Exception to a Count, by saying, *That he holdeth not the Land specified in the Count*, or at least some part of it.

This is said to be either General, or Special.

Especial, As that he was not Tenant the day whereon the Writ was purchased.

General, That he never was Tenant to the Land in Question.

See New Book of Ent. Tit. eod. & postea.

Non

Non sum Informatus, See before p. 65. Non sum In-

Non sane Memoriè, See before Non formatus.

Compositus. 96. Non sane Me-

moriè.

Non-Term is the time of Vacation be- Non-Term.

tween Term and Term. *Lamb. Arch.*

fo. 126.

Novel Assignment, Observe after.

Novel Assign-
ment.

C H A P. III.

Rules for the Plea or Bar, &c.

First, The Pleadings in the Courts *Pleas in Latin.* of Westminster must be entred in Latin, *Stat. 36. Ed. 3. ca. 15.* and Plead-ed in English.

And it is intended in Law, that every Plea is entred when tis Pleaded: For anciently the Serjeants at Law did use to Plead all the Pleas in Court at the Bar, and before they were entred they could not Plead them. *Stile's Reg. pag. 241.* And anciently all Plead-ings were in French. *Ibid. 238.* But now the Entries are seldom carried in till the Essoyn-day of the next Term.

Every Plea must be Pleaded either *Every Plea* in Bar to the Action brought, or in *must be either* Abatement of the Writ upon which *in Bar or A-* the Action is framed, otherwise it is *batement,*

H but

but a Discourse, and not a Plea, because the Plaintiff cannot take an Issue upon it: And therefore if the Plaintiff do Demur upon it as not sufficient, &c. and his Demurrer be adjudged good, he shall have Judgment against the Defendant. *Ibid.* 238. *Pas. c.* 23. *Car. B. R.*

Demurrer ad-
mits the Plea.

If one do Demur upon such a Plea as ought not to be Plead, by his Demurrer he doth admit the Plea. *Ibid.* 241.

Demurrer to an
Issue in Abate-
ment over-rul-
ed.

If one tender an Issue in Abatement of a Writ, and there is a Demurrer to it, if the Demurrer be Over-ruled, There must be a *Respondez Ouster*, for the Over-ruling of the Demurrer is peremptory to the party, for the matter in Question is not determined by the Demurrer, but only the goodness of the Writ brought. *Ibid.* 240.

Plea in Abate-
ment or Bar,
sometimes in-
differently used.

One may (sometimes) Plead a Plea by way of Abatement, which is properly a Plea in Bar, and a Plea which is properly a Plea in Abatement by way of a Plea in Bar; but this holds but in few Cases. *Ibid.* 241.

Plea in Abate-
ment when to
be received.

A Plea in Abatement of the Writ, ought not to be received after the Defendant hath imparled; yet if it be received, and the Plaintiff doth Demur to it, the Demurrer may be good. For the acceptance after impar-

parlance, is no prejudice to the Defendant. *Ibid.* 241.

Good matter must be Plead in apt time, and in due Order, otherwise great advantages may be lost, *Co. Lit.* 303. Time and Order to be observed.

Every Plea must be direct, and not by way of Argument or Rehearsal; and every Man shall plead such Pleas as are pertinent for him, according to the quality of his Case, *Ibid.* 303. Plea must be direct and pertinent.

Every Plea that a Man Pleadeth ought to be Tryable, otherwise the Cause can receive no end, *Co. Lit. Ibid.*

Pleadings which amount to the general Issue, are not to be allowed, but if referr'd. the general Issue is to be entred. *New Book of Entries*, fo. 24.

That which is Issuable ought to be Pleaded certainly, *Kitch. 228, 229.* Certainty.

Where the Defendant may Plead the general Issue, he ought so to Plead, *pleaded as to* That the whole matter in Question may come to be Tryed, for else the Plea is not good, *Stiles Reg. p. 237.* Try the whole matter Issuable.

Where the Defendant is not constrained to Plead a Special Plea, he may Plead the General Issue proper for the Action brought, and give the Special Matter in Evidence, *Ibid. 239.* *Sed Quare i Keb. 107.*

Rules for the

General Plead-
ing allowed.

2 H. 7. 15.
4 H. 7. 12.
26 H. 8. 5.
Affirmative.

Negative.
Disjunctive.

*A thing in my
own notice to be
particularly
pleaded.*

*Act in Law
and general
allegation.*

Things Spiritu-
al.

Matter infinite.

In many Cases the Law doth allow General Pleadings, for the avoiding of tediousness, and the particular shall come on the other side. As if the Condition of an Obligation be to perform all the Covenants in an Indenture, if all the Covenants be in the Affirmative, he may Generally Plead performance of all: But if any be in the Negative, to so many he must Plead Specially: So if any of them be in the Disjunctive, he must shew which of them he hath performed: So if any of them are to be done upon Record, he must shew them Specially, *Co. Lit. 303. 8 Co. 133. Turners Case; and 120. Bonhams Case,* 9 *Co. 25. 61. 10 Co. 100. 3 Cro. 749. Mints vers. Bethel.*

Where a thing rests in mine own notice, I must Plead this particularly; otherwise not, 14 *H. 4. 15. 2 Ed. 3. 17. 19 H. 6. 32. 78. 21 Ed. 4. 78. 12 H. 8. 6.*

Where one comes in by act in Law, the General Allegation sufficeth, 10 *Rep. 94. 3 H. 6. 20. 35 H. 6. Monstrans de faits. 118. 11 H. 4. 83. 44 Ed. 3. 26. 13 H. 7. 14.*

Things Spiritual may be Pleaded Generally, 11 *H. 7. 27. 12 H. 8. 6.*

Where the Plea consists of Matter infinite, it may be Pleaded Generally, 5 *Ed. 4. 8. 10 Ed. 4. 5. 2 H. 7. 15.* See 3 *Cro. 749.*

That

That which is alledged by way of *Allegation by Inducement, or conveyance to the substance of the Matter, needs not to be so certainly alledged, as that which is of the substance it self,* *Plow. 81. Co. Lit. 303.*

When any special and substantial *Special matter* Matter is alledged by either Party, *That to be specially ought to be especially answered, and not to be passed over by a General Plea-* *ding,* *Co. Lit. Ibid.*

Matters of Record, especially when *Matters of Record.* they are the Foundation or Ground of the Suit of the Plaintiff, or the substance of the Plea, must be certainly and truly alledged; otherwise it is where it is but a conveyance: And the proceedings and Sentences in the Ecclesiastical Court, may be alledged briefly, *Co. Lit.* *Ibid. Plow. Com. 65. a.*

All necessary circumstances implied *Circumstances implied by Law.* by Law in the Plea, need not be expressed: As in the Plea of a Feoffment of a Mannor, Livery and Attornment are implied, *Co. Lit. 303. 7 H. 7. 3. 12 Ed. 4. 1.*

When a Man is Authorized to do any thing by the Common Law, by Grant, Commission, Act of Parliament, or Custom, he ought to pursue the substance and effect of the same accordingly, *Co. Lit. Ibid.* *The substance and effect of an Authority must be pursued.*

General Estate generally alledged, but particulars must be averr'd.

General Estates in Fee Simple may be generally alledged, but the Commencement of Estates in Tail, and other particular Estates, must be shewed: Unless it be in some Cases, where they are alledged by way of Inducement, and the Life of Tenant in Tail or for Life, ought to be rverr'd, *Co. Lit. Ibid.*

That which is apparent to the Court by necessary Collection out of the Record, need not to be averr'd.

No Averment against Statute, Null tiel Record.

Where a Statute is recited, There one may not aver, That there is no such Record; for such an Averment doth not lye against a Record, being a thing of a solemn and high nature; but an Averment is but the Allegation of the Party, *Pract. Reg. pag. 19. 20.*

A Plea grounded upon a Statute, if not good, is not helped after Verdict, *Item 243.*

Not against the Condition of an Obligation.

One may not aver a thing contrary to the Condition of an Obligation, no more than he may against a Record, for the Condition is part of the Deed, which shall be supposed to be made upon good deliberation and before Witnesses, and not to be contradicted by a bare Averment, *Idem pag. 20.*

Words made Actionable by the Defendants explaining.

Although words were not Actionable in themselves at the time of the speaking them, yet if an Action be brought

brought for the speaking of them, they may be made Actionable by the Defendants Pleading, by explaining the words,
Pract. Reg. 350, 351.

When a Count, Declaration, Bar, ^{Omission of time or place made} Replication, &c. is defective in respect of omission of some circumstance ^{of good by the Defendants pleading.} time or place, &c. There it may be helped and made good by the Pleading of the adverse party; but if it be insufficient in matter it cannot be helped, *Co. Lit. 303.*

So uncertain words in the Count or Declaration may be made good and certain by a Plea in Bar, by the Defendants taking notice of the meaning of them, *Pract. Reg. 351.*

Surplusage shall never make the Plea vicious, but where 'tis contrary to the matter before, *Ibid.*

Yet the Plea must be single and certain, for the Plea that doth contain duplicity or multiplicity of distinct Matter, to one and the same thing, whereunto several answers (admitting each of them to be good) are required, is not allowed, if it be peremptory and perpetual: But if it be only Dilatory, it may at some times be used; And upon the General Issue Pleaded, the parties may give in Evidence as many Matters as they will, *Co. Lit. 304. New Book of Entries, fo. 21.*

Plea must answer all the matter of the Declaration.

If the Defendants Plea do not answer all the Matter contained in the Plaintiffs Declaration, it is no good Plea; but the Plaintiff shall have his Judgment intire against him for want of a Plea, although the Declaration be naught in some part of it.

Advantage of Demurrer if rejected.

For although the Defendant might have Demurred to the Declaration, yet not doing it, it shall be intended he had no Cause for it. *Pract. Reg. 245.*

Plea must have a proper conclusion.

The Plea must conclude aptly, according to the nature of the Matter contained therein; as in Bars, Replications, Rejoyners, and Surrejoyners, the party must conclude, *Et hoc paratus est verificare, &c.*

Nient littered.

And if the Action be brought upon an Especialty, and the Defendant plead he is *Nient littered*, and that it was otherwise read to him than in truth it was written, he must conclude *Judgment si fait*, or *Nient son fait*.

Special Matter not waived by Ill ne and Sic in the affirmative.

But when to a Debt or Obligation, he doth plead payment and delivery of the Obligation, he must conclude *Judgment Si Actio. Finches Law 359. Plow. 343. Kitch. 219, 220, 236.*

When the conclusion of a Plea *Et Iffint & sic*, is in the affirmative, it shall not waive the special Matter.

But

But where the conclusion is in the negative, there regularly the special Matter is generally waived, *Co. Lit. 303, 133.*

Where special Matter is Pleaded, and the conclusion *Et sic*, is to the point of the Writ or Action, the special Matter is waived, *P. 27 H. 8. Pl. 34.* And 'tis a tender of the General Issue, *Pl. 66.a.*

Where one has special Matter and Pleads it, and concludes with the General Issue, it waves not the Matter precedent; as in debt, to plead unlettered *Iffint non est factum*; or a special payment, *Iffint Riens luy doit*; or for one to plead that he was Joyntenant with his Feoffee at the time of the Feoffment, *Et iffint Riens passe per le fait*, 10. Ed. 4. 3 M. 9 E. 4. Pl. 15. and fo. 19. b.

The Pleading of every Man shall be taken most strongly against himself, for every Man is presumed to make the best of his own Case, *Co. Lit. 303.*

The Court will not direct any person how to plead, although the Matter be difficult, and though they be moved to do it, but will bid them plead at their own perils. For Counsel are to advise how to plead; and the Court is only to judge of the Pleadings, whether they be good in Law or not, *Pract. Reg. 238.*

When

The Court orders an Issuable Plea.

When the Court doth order the Defendant shall plead, it is intended he shall plead an issuable plea, *Idem 236. Mich. 22. Car. B. R.*

The Court will not make a peremptory Rule to plead till the Common Rules be out.

But the Court will not upon Motion Rule the Defendant to plead peremptorily by a day, before the Common Rules of the Court for Pleading be out, but then they will. For till then it cannot be said, that the Defendant hath delayed the Plaintiff, *Idem 226.*

Defendant shall not take advantage of his own ill Plea.

If one plead an ill Plea, and the Plaintiff joyns Issue upon this Plea, and a Verdict is thereupon found for the Plaintiff, the Defendant shall not afterwards take advantage of his own ill Plea to avoid the Verdict, *Idem p. 239.*

Immaterial Issue joyned.

If an immaterial Issue be joyn'd, it is not helped by the Statute of Jeofails, but there ought to be a Repleader, *Idem 245. Vide postea tit. Issue.*

Conclusion of the Plea.

Conclusion of the Plea is the later part of a Bar, Plea or Replication, according to the nature of the thing, and usually in these words, *Et hoc paratus est verificare, Unde petit Judicium, &c.* But each Plea ought to have its proper conclusion, as a Plea to the Writ, to conclude to the Writ, Plea in Bar to conclude to the Action, an Estoppel to rely on the Estoppel, and so of the like, *Co. Lit. 303.* See after.

Rules for the Replication.

The Replication ought not to depart from the Count, *Co. Lit.* 303.

*Replication not
to depart from
the Count.*

Yet one may count of a Gift in Tail, and maintain this in his Replication, by a recovery in value, because he cannot have any other Count, *Idem* 304.

When the Replication doth neither confess and avoid, nor Traverse the Matter of the Bar, it is naught, and the Plaintiff may Demur to it and Assign this, *New Book of Entries*, fo. 14.

*Replication not
confessing and
avoiding, nor
Traversing the
Matter of the
Bar, is naught.*

Where the Bar is ill in substance, it may not be made good by the Replication, 8 *Rep.* 120.

*Where the Bar
cannot be mend-
ed by the Re-
plication.*

But where the Bar is ill in Circumstance, it may be made good by the Replication, 6 *H. 7.* 10.

*Where the Bar
may be helped
by Replication.*

If the Plaintiff do reply to a Plea in Bar, which is not good; By his replying to it, he hath confessed it to be good, *Pract. Reg.* 294. For he hath lost his advantage of Demurring unto it, by passing by the Defects and replying to it.

*The Plaintiff by
replying allows
the Plea.*

When it appears by the Replication, that the Plaintiff hath no cause of Action, there he shall not have Judgment, though the Bar be insufficient in matter, 8 *Rep.* 120.

When

Bar insufficient, Replication immaterial, Plaintiff shall have Judgment.

When the Bar is insufficient in matter, and amounts to the confession of the point of the Action, and the Plaintiff replies, and shews the truth of his Matter to inforce his Case, and in Judgment of Law it is not material, yet the Plaintiff shall have Judgment, 8 Rep.

120.

Conditions per- form'd pleaded, Plaintiff must shew in what the Condition is broken.

In an Action for Breach of the Condition of an Obligation brought, and the Defendant doth plead that he hath performed the Condition, the Plaintiff in his Replication must shew particularly in what the Defendant hath broken the Condition, otherwise 'tis idle, and says no more than what was formerly said in the Declaration, Pract. Reg. 294.

Difference be- tween a Neg- ative, and an Affirmative Condition, and how the Plaintiff must reply.

There is a difference when the Condition is in the Negative, not to do a thing, 'tis sufficient to say in the Replication he did do it; and when in the Affirmative to do, as to perform his Office, and to Enfeoff him of all his Land, &c. there he must shew what his Office was and what Lands he had, and that he did not, &c. M. 2. R. 3. fo. 17. Pl. 44. vide Latch 16. 1 Leon. 136. Trin. 4. H. 7. 7. Pl. 6.

Conclusio del Repl.

The Conclusion of the Replication if it be in the Affirmative, must be *Et hoc paratus est verificare*: Otherwise if it be meerly Negative. Co. Lit. 303.

Novel

Novel Assignment is in the nature of New Assignment defined.
a Replication ; and it is used for the better setting down, and ascertaining of the time and place, &c. which was not before well Assigned, but generally in the Declaration, as when the Plaintiff declares of Trespass *Clasum fregit*, cutting down grafts, &c. in such a Parish and County , The Defendant Pleads and says, that the place where, &c. are 10 Acres of, &c. and are his own Freehold , *per quod he entred*, &c. as into his own Freehold, &c.

Then the Plaintiff says , the Close *How to be Assigned.*
and place where, &c. are 20 Acres of,
&c. lying in the Parish of, &c. and called and known by the name of, &c. other than the said Acres mentioned in the Defendants Plea ; and for that the Defendant hath not answered to the Trespass in the 20 Acres newly Assigned, the Plaintiff *pet' Judic' & dampna sua occasione transgr'*.

To this new Assignment the Defendant must plead, if he hath any thing in Bar thereof. See *Brock, titulo Trespass.*

This new Assignment is used often to *the use thereof* clear a Title, which upon it comes in question ; and here if the Title appear to be the Plaintiffs , he shall recover damages; but he recovers no Possession, as in *Ejectment*. See *Compl. Sollicitor 219.*

Note

Nota.

Note, It is laid, That if the Defendant say, the Trespass was in six Acres of Land, and that those six Acres were his Freehold: The Plaintiff may reply, That it is his Freehold, and not the Freehold of the Defendant. And then if the Plaintiff have six Acres there, and the Defendant six Acres there; the Defendant cannot give in Evidence, that this Trespass was in his six Acres.
Bro. Tresp. 112. Dyer 33. 147. 27 H. 8. 7.

De son Tort demesne.

De injuria sua propria, what,
and when.

Example.

De injuria sua propria are words of Art, used in an Action of Trespass, by way of Replication, to a Plea of the Defendant.

As for Example:

If *A.* sue *B.* for Trespass, and *B.* doth Answer, that he did it by command of his Master.

A. replies he did *De injuria sua propr' absq; tali Causa, &c.* (or *absq; hoc*, that his Master commanded him *modo & forma*) and here he traverseth the Cause or Commandment of the Master.

Where the Plea
is matter of
Excuse.

8 Co. 67. *Crogat's Case*, saith, That this Plea by way of Replication is to be pleaded, where the Defendants Plea is matter of Excuse; and not where he claims an Interest

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Interest in his own Right, or in the right of his Master.

Yet with a Traverse it may do well, *Traverse,* as above; and so where a Bayliff justifies Imprisonment, for that a *Capias* was awarded to the Sheriff, who made a Warrant to him, *De injuria sua propria* is no Plea (without traversing the Warrant) because it referreth to all the Plea in Bar; and so all parts of the Plea should be tryed, and the Issue would be full of Multiplicity.

And also in this Case of the Bayliff, such a Replication would bring the Record to be tryed by a Jury; yet it might have been a good Plea, if the Proceedings had been in a Court not of Record.

Again, where an Authority is derived from the Plaintiff himself, or is given by Law, as to see if Waste, &c. The Plaintiff ought to Reply to it, although no Interest be claimed, and he shall not plead *De injuria, &c. Co. at supr.*

Rejoyneder.

If the Defendant do in his Rejoyneder depart from his Plea pleaded in Bar, this Rejoyneder is not good: For this is to Say and Unsay, which the Law doth not allow, and Pleas must be plain and certain, *Pract. Reg. 291.*

One

*Not to Rejon
upon such
Words as are
not contained
in the Decla-
ration or Plea.*

*Rule for Sur-
rejoyneder, &c.*

*Must answer
the matter ob-
jected by the
Adverje party.*

*Caution of
Departure.*

*Example of
Departure.*

One ought not to Rejoyn upon such words which are not contained in the Declaration or Plea: For that is for the party to frame a Discourse of his own, and not to Answer the Plaintiff's Plea.
Id. ibid.

And the Rule is the same as to Rejoynders and Surrejoynenders, &c. For as to the Replication, Rejoynder, and Surrejoynender, there must be a sufficient Answer to the Matter objected by the Adverse party, and follow and inforce the Matter offered by him that doth plead, in his pleading before. So such party must take heed of the ordering of the Matter of his pleading lest his Replication vary and differ from his Count or his Rejoynder from his Bar: For this is not sufferable, and is called a Departure in Pleading, when the Second Plea doth contain Matter not pursuant to the former, and which doth not fortifie the same.

As if in Affize the Tenant plead a Descent from his Father, and giveth a Colour: The Demandant entituleth himself by a Feoffment from the Tenant himself: The Tenant cannot say, That the Feoffment was upon Condition, and to shew the Condition broken; for that would be a clear departure from his Bar, because it containeth Matter subsequent. But if in Affise,

Assise, the Tenant plead in Bar, That J.S. was seized, and enfeoffed him, &c. and the Plaintiff sheweth, that he himself was seized in Fee, until J. S. disseised, who enfeoffed the Tenant; and he re-entered: The Defendant may plead a Release of the Plaintiff to J. S. for this doth fortifie the Bar, *Pl. Com.* 105. 1 *Mar. Dy.* 95. 28 *H. 8. ib.* 31. 6 *H. 7, 8.* 3 *H. 6. Departure 2. Co. Lit.* 304.

And the Rule is, That where the Defendant in Trespass, &c. fortifies his Bar, ^{Rule of De-} parture. and there is no other but pursuant to the Bar, and goes before the Bar in Conveyance of his Title; this is no Departure. But where the Bar is before the Matter shewn in his Rejoyneder; this is a Departure, by *Kable*. See 1 *E. 3. 4. 35 H. 6. 3 H. 6. 37 H. 6.* See *Touchstone of Prec.* p. 200, 201, 202, 203:

Rebutter is a kind of an Estoppel, } &c.
Surrebutter a Replication to it,

An Estoppel is defined to be a Bar or *Estoppel di-* hindrance unto one to plead the Truth, *fined*. and restraineth it not to an Impediment given to a Man by his own Act only, (as it is restrained in *Fitz. N. B. fo. 142. K.*) but by another also, 2 *Co. fo. 4. God-* dard's Case.

I

Where

*Who shall take
advantage by
it.*

Where the Record of the Estoppel doth run to the Disability or Illegitimation of the person ; there all Strangers shall take benefit of the Record ; as *Outlary, Excommengement, Profession, Attainder of Premunire, of Felonies, Bastardy, Mulierty, &c.* and shall conclude the parties, though they be Strangers to the Record.

But of a Record , concerning the Name of a person, Quality, or Addition, no Stranger shall take advantage, because he shall not be bound by it.

Rebutter.

A Rebutter is a kind of an Estoppel.

*Supposals in
Counts.*

Matters alledged by way of Supposals in Counts, shall not conclude after Non-suit : Otherwise it is after Judgment given.

Non-Suit.

And though after Non-suit the Supposal in the Count shall not conclude ; yet the Bar, Title, Replication, or other Pleading of either party, which is precisely alledged, shall conclude after Non-suit.

*Estoppel Reci-
procal.*

Every Estoppel ought to be Reciprocal ; *id est*, to bind both parties ; which is the Reason, that (regularly) a Stranger shall neither take advantage, nor be bound by the Estoppel.

Every

Every Estoppel, because it concludeth *Must be certain*, a Man to alledge the Truth, must be certain to every intent, and not to be taken by Argument or Inference.

Every Estoppel ought to be a precise *Precise*. Affirmation of that which maketh the Estoppel, and not to be spoken Impersonally, as if it be said (*ut dicitur*), nor by way of Recital, because 'tis no direct Affirmation.

A Matter alledged, that is neither *Traversable*, traversable nor material, shall not estop.

Regularly a man shall not be concluded *Acceptance*, by Acceptance, or the like, before his Title accrued.

Where the Verity is apparent in the *Verity in Record*, the Adverse party shall not *cord*. be estopped to take advantage of the Truth; for he cannot be estopped to alledge the Truth, when the Truth appears of Record.

See *Co. Lit. fo. 352. a.*

Estoppel against Estoppel doth put the Matter at large.

But for these Rules above, with many *Rules for Authorities cited*, and the Books recon- *Estoppel*. ciled, see the *Abridgment of Coke's Lit.*

390, 391, 392.

And for these Rules below, see *Touchstone of Prec.* where you have also these Examples, from pag. 115, to 125.

Claim.

Who Claims nothing by him that was estopped, shall not be estopped,
p. 115.

By Tenant for Life.

Where he in Reversion or Remainder, claims nothing by Tenant for Life, he shall not be estopped, p. 116.

By Judgment.

If a man will plead a Record to estop him that was privy, he ought to shew what end the Action had, 118.

Advantage of Privies.

Where a man hath Judgment to recover Land, by that Judgment he shall be estopp'd to claim any other Title, than he hath by the Recovery, *Ibid.*

f Strangers.

Of some Estoppels, none shall take advantage, but those who are Parties or Privies, 120.

User of Action.

But of some Estoppels, every one shall have advantage, *Ibid.*

Estoppel passes with the Land.

User of an Action is no Estoppel to prejudice another; *viz.* Heir, &c. 121.

Advantage of Strangers, &c.

In every Case where I am barr'd of Land, as if it be found that I am not next Heir; this Estoppel shall pass with the Land, and every one that claims the Lands by me shall be estopped; but of other Lands, it shall be no Estoppel against me, *Ibid.*

No Stranger shall take advantage by an Estoppel, but where the Estoppel extinguisheth the Right, 123.

A Stranger shall not take advantage of an Estoppel *en Fait*, if it be in the Realty; but by Matter of Record 'tis otherwise, *Ibid.*

Sc Touchst. of Prec. from 115, to 125.

Savage against Turberville, Trin. 22.

Car. 2. R. Trans. & Insult. in Quer'.

Plocitum de Insult' sua propri', & in defensione sua.

Repl' de Injuria sua propri', &c. Et Issue tender.

Estoppel ad triand' Exit' pred', Quia Rejoynader. Def. al' implacitavit.

Quer', Et Jur' dixer', Quod fuit Cub' de Transgr' & Insult' il', Que est eadem Transgr' in placito Def. nunc mentionat', &c.

Quer' morat', Et pro Causis, Quod pred' placitum pred' J. rejungen' placitat' est decessus a barr' ejusdem J. Quod Placitum ill' est vitiosum incert' insufficiens in se & caret forma & Def. jungit in morat'.

This Cause was Argued by Serjeant Maynard, and some others; and the Court doubted that the Rejoynader was good: Whereupon the parties submitted to an Award, so no Judgment was given by the Court.

Resceit.

Resceit, what.

Resceit is the admission of a Third person, to plead his Right in a Cause formerly commenced by others. As,

If Tenant for Life or Years bring an Action, and in this Suit he in the Reversion doth come in, and pray to be received, to defend the Land, and to plead with the Demandant :

And if thereupon he is so, this is Resceit. See *Brook Tit. Resceit. Perkins Dower 448.*

Resceit is also applied to Admittance of Plea, though the Controversie be but between two only.

See *Bro. Estoppel*, in many places.

Vide Aid Prayer, 109.

Counterplea.

*Counterplea, what.**Aid Prayer.*

Counterplea is a kind of Replication. As,

When the Tenant in Dower, or by the Courtesie, doth pray in Aid of the King, or him in the Reversion, for his better defence.

Or else, if a Stranger to the Action begun, desire to be received, to say what he can for the safeguard of his Estate ; That which the Demandant alledgedeth against this Request, why it should

should not be admitted, is called a Counterplea.

See Bro. Tit. eod. 25 E. 3. Stat. 3. ca. 7.
Anno 3 Ed. I. ca. 39. See New Terms of
the Law.

For one to Wage his Law, is to take Ley Gager an Oath, That he oweth not the Debt *defined*. demanded of him upon a Simple Contract, nor any Peny thereof, in manner and form as the Plaintiff declared.

See Compleat Sollicitor, p. 249.

But *Vadiare Legem* is said to be, when *Vadiare Legem* one puts in Security, that he will make Law at a Day assigned. And,

Facere Legem, to make Law, is to take *Facere Legem*. an Oath, that he oweth not the Debt challenged at his hand, and this Law is used in an Action of Debt without Specialty, &c. Bract. L. 3. tract. 2. ca. 37. Glanvile L. 1. Ch. 9, & 12.

The Plea is *Nil debet per Legem*.

See the manner of Waging Law. Com- The manner
plete Sollicitor, p. 250. whereof.

See when, and for what, Touchst. of
Prec. from p. 294, to 316.

The Defendant may Wage his Law to a Book-Debt, or upon a *Mutual*; upon an *Insimul computasset*, and in *Detinue*.

Also in an Action of Debt upon an Arbitrament, or in an Action of *Detinue* *allowable*.
by the Bailment of anothers hand,
Compleat Sollicitor, p. 249.

Also in an Action of Debt for an *Amerciament* in a Court Baron ; but not in Debt for a *Fine* or *Amerciament* in a Court Leet, &c. *Id. ibid.*

In an Action of *Cafe* upon an *Assump-*
fit, the Defendant may not Wage his
Law, 4 Co. 92. *Slade's Cafe.*

Nor in *Trover*; which is the Reason
more Actions of *Trover*, than *Detinue*
are brought.

See *Compleat Sollicitor*, p. 222.

Garnishment signifieth in our Com-
mon Law, a Warning given to one
for his Appearance, and that for the
better furnishing of the Cause and
Court. As,

When one is sued for the *Detinue* of
certain Evidences or Charters, and saith,
That the Evidences were delivered unto
him not only by the Plaintiff, but by
another also; and therefore prayeth,
That that other may be warned to
plead with the Plaintiff, whether the
said Conditions be perform'd, yea, or
no. And in this Petition he is said to
pray *Garnishment*, See *New Book of En-*
tries, fo. 211. col. 3. *Terms of the Law.*
Crompt. Jurisd. fo. 211.

Which may be interpreted either
Warning of that other, or else fur-
nishing of the Court with Parties suffi-
cient, throughly to determine the
Cause; because until he appear and
joyn,

Garnishment
defined.

Example.

The Reason
thereof.

joyn, the Defendant is as it were out of the Court; *Fitz. N.B.* 106. G. and the Court is not provided of all Parties to the Action, See *Britton, Chap. 28.* and *Kitchin, fo. 6. 283.*

Garnishment is granted for saving the Condition, if not performed; only this, Whether the Defendant did or not, and for no other Cause, *40 Ed. 3. 11 pl. 24.*

The Defendant in Detinue pleads, *Delivery on Condition.*
That the Plaintiff and *B.* delivered this upon Condition, and prays Garnishment, and had it without shewing what Conditions were, *3 H. 4. 18.*

Garnishment prayed of the Heir and *Deeds in a Box.*
Executor of *B.* good; because it did not appear, whether the Deeds in the Box were Real or Chattels, *14 E. 4. 1. pl. 3. 21 Edw. 3. 41. pl. 44. 48 Ed. 3. 30. pl. 19.*

Garnishment was granted against an *Against an Executor.*
Executor, because it was supposed, That the Testator was one that delivered the Deeds, *14 H. 6. 11. pl. 42.*

The Defendant shall have Garnishment, although the Garnishee was a Stranger to the Delivery, *14 E. 4. 2.*

See more of this, *48 Ed. 3. pl. 19. Lib. Int. 216. D. 217. C. Sect. 1.*

Enterpleader is a discussing of a Point *Enterpleader,* incidently falling out before the Principal Cause can take an end.

As

Example.

As if two several persons being found Heirs to the same Land by two several Offices in one County, the King is brought in doubt too, Whether Livery ought to be made; and therefore before Livery was to either, they used to interplead and formally try between themselves, who was the right Heir, *Stamp. Prærog. ca. 19. Fincbes Ley 129.*

See *Brook Tit. Enterpleader.*

*Enterpleader
in Detinue.*

Note, There shall be no Enterpleader, unless the Defendant pray it, *18 Ed. 3. 22. pl. 3.*

*When allowa-
ble.*

If the Parties are by Attornies, Day shall be given over, because they shall not enterplead but in person, *9 Ed. 3. 334. pl. 12. 24 Ed. 3. 24. pl. 3.* And if he come by Attorney at his Day, the other shall not have Judgment against him, *9 E. 3. 334. pl. 12.*

In Detinue, the Defendant pleads another Writ hanging *per* another, and prays Enterpleader; and it was granted, for the Mischief that might be, for otherwise both might recover the Deeds, and so be twice charged, *3 H. 6. 43. pl. 20.* See *3 H. 6. 35. pl. 31.* and *9 H. 6. 36. pl. 9.*

If the Defendant and Garnishee do not agree in Plea, there shall be no Enterpleader, *14 H. 6. 11.*

There

There shall be no Enterpleader, unless the Defendant alledge, that both demanded one thing, 8 Ed. 4. 6.

See 2 R. 2. 13. 33 H. 6. 25. pl. 8. 19 H. 6.
4. L. Intr. 213. A. & B. Sect. 1.

Jeofail and Repleader.

Jeofail is when the parties to any Suit Jeofail, what in Pleading have proceeded so far, that they have joyned Issue, which shall be Jeofail *com-* tryed, or is tryed by a Jury or Inquest, *pounded of* and this Issue is so badly joyn'd, that *Jay faille*, i. e. it will be Error if they proceed; then *Ego lapsus sum and signifieth an oversight in* some of the Parties may by their Coun-*Pleading*. sel shew it to the Court, as well after *Cow. Int. Tit.* Verdict and before Judgment, as before *cod.* the Jury be charged. And if the Jury be ready at the Bar when this is first moved, the Court will discharge them, and put the Parties to Replead; that is, to plead again from the place where the Defect is; and this was formerly in use in the Kings-Bench. But divers of these Defects or *Jeofails* are now help'd by several Statutes; as 32 H. 8. ca. 30. (18 El. 14. 21 Jac. 13. is Vid. Co. Rep. said to extend only to any faults in Form, in Count, or Declaration) Stat. 16 & 17 Car. 2. ca. 2. extends to defaults in Form, or want of Form: So that default in Substance has no remedy.

Repleader

*Repleader,
what.*

Repleader therefore is to Plead again that which was pleaded insufficiently before : And the Rule was,

If the Bar be good, and Replication ill, the Plaintiff shall make a new Replication : So if the Bar and Replication be good, and Rejoyneder bad, and Issue be taken upon that, there shall be a new Rejoyneder.

But if the Bar be bad, and Replication good, and Issue taken upon that, they must plead all again ; But this altered ; In all Actions after Issue had, there shall be Judgment given notwithstanding, &c.

32 H. 8. 30.

Note.

Note, But after Demurrer there shall not be any Repleader , 3 Co. 52. Finch Ley 397. Bro. Repleader 54.

For whereas 'tis said , Pleadings must be certain, That the Adverie party may know whereunto to Answer, or else he were at a Mischief.

This Mischief is remedied by Demurrer.

Vide Demurrer,

CHAP.

C H A P. IV.

Of Demurrer.

DEMURRER signifieth a kind of *Demurrer de-*
Pause upon a point of difficulty *fined.*
in any Action, and though both par-
ties are agreed about Matter in Fact ;
yet there are in difference about Matter
in Law, and the one hath said some-
thing whereof the other doth take ad-
vantage, and saith, That he will go no
further , for that the other hath not
pleaded sufficient Matter against him.
But the other joyneth to this Demurrer,
and saith that the Matter is sufficient ;
and thereupon both parties agree to
insist upon that Point, and to refer it to
the Judgment of the Court ; For in e-
very Action the Question in difference
is either about Matter of Fact, or about
Matter of Law.

The Jury are for the Fact : And,
The Judges for the Law.

If the Point be easie, or the Judge ^{Judgment gi-}
will take upon him to determine _{ven thereon.}
it, then Judgment may be given
presently.

But if it be doubtful or difficult, then
the Judges do stay and take time,
to Consider.

And

And it is the usual course to give a Day to the Parties: And if the major part of the Judges of the Court where the Cause is, cannot agree it there (which seldom happens otherwise) it must be sent to the Exchequer Chamber to be decided; and if they conclude, it standeth firm without further Remedy. *Smith de Rep. Angl. Lib. 2. Cap. 13.*

And if the major part of all the Judges cannot agree it there, it must be sent to the next Parliament, and decided there, *Co. Lit. 71, 72.*

See *Terms of Law*, and see *Bro. 199. Dyer 278. Plow. 5. 66. Finche's Ley 427.*

*Demurrer,
when, and
what.*

The Demurrer may be made either to the Count, or to the Plea, or upon other parts of the Pleading. Also it may upon an Aid-Prayer, Voucher, Resceit, or Wager in Law; and sometimes upon the Evidence at a Tryal.

And in all these Cases in Pleading, it is and may be either General or Special.

*General De-
murrer.*

General, without shewing any Cause, save only that it is Insufficient in Law.

*Special De-
murrer.*

Special, when he sheweth wherein it is not sufficient, and doth rely upon that Point.

*Joining in
Demurrer, and
how Judgment
must be given.*

And after Demurrer joyn'd, the Judges shall give Judgment according as the very Right of the Cause and Matter

Matter in Law shall appear, without regard to any want of Form, in any Writ, Return, Plaintiff, Declaration, or other Pleading, Process, or Course of Proceeding: Except those Causes only which the party demurring shall particularly set down in his Demurrer, Co. Lit. 71; 72. 14 H. 4. 31. Stat. 27. El. 5.

After Demurrer, no Repleader, &c. that is, after Demurrer joyn'd, *Vide antea & postea.*

Note, He which demurreth in Law, *Moratur, or Demoratur in Lege.* Matters in Law are decided by the Judges, and Matters in Fact by Juries.

And as there is no Issue upon the Fact, No Demurrer but when 'tis joyned between the Parties; so there is no Demurrer in Law, but when 'tis joyn'd, Co. Lit. 71.

And if the Demurrer be sufficient, and Judgment for the other party will not joyn therein, *not joyning.* there may be Judgment by *Nil dicit.*

But if the Demurrer be frivolous, on- *Frivolous Demurrer.* ly to put off the Trial, the Court will not force them to joyn, *Pract. Reg. 82.*

Ovserve more of this after.

Rules concerning Demurrer.

General Demurrer confesseth Matters of Fact.

He that demurreth in Law, doth confess all such Matters of Fact, as are well and sufficiently pleaded, to be true, *Co. Lit. 72. 5 Co. 69. Burton's Case.*

See *Pract. Reg. 241. Plow. 85.a.*

Special Demurrer waives all Matters of Form.

He that demurs Specially, hath waived all other Matters of Form, and can take no advantage of any other Matter of Form, but what he hath spoken of; yet he may take advantage of any other Matter of Substance.

See 10 Rep. 88. *Vide postea.*

Special Plea, and concludes what a Demurrer.

In some Cases a man may alledge Special Matter, and conclude with a Demurrer. As,

In an Action of Trespass brought by J. S. for the taking of his Horse; the Defendant pleads, That he himself was possessed of the Horse, untill he was by one J. S. dispossess'd, who gave him to the Plaintiff, &c.

The Plaintiff Replies, That, J. S. named in the Bar, and J. S. the Plaintiff, were all one person, and not diverse. And to the Plea pleaded by the Defendant in the manner, he demurs in Law. And the Court did hold the Plea and Demurrer good; for without the Matter alledged he could not demur, *Co. Lit. 72.*

A Demurrer to an Evidence is, when *Demurrer to an Evidence.*
the party that doth Demur upon it,
doth demand the Judgment of the
Court, whether the Matter given in E-
vidence be sufficient (admittieg all to be
true) to find a Verdict for the Plaintiff,
upon the Issue that is joyned betwixt
him and the Defendant.

And when such a Demurrer is taken,
the Plaintiff and Defendant must agree
the Matter of Fact in Dispute betwixt
them, otherwise the Court cannot pro-
ceed to determine the Matter in Law,
Pract. Reg. 83. Pascb. 23. Car. B. R. Idem
114, 115.

For the Court are not to try Matter
of Fact, for that would be for them
to give a Verdict: For the Court are
only to declare the Law, Whether (ad-
mitting that all the Matter given in E-
vidence by the Plaintiff) be true, it
doth prove the Issue in question, or not,
Idem 166.

Et pred' A. dic', Quod Materia pred' per *Demurrer to*
pred' B. Jur' pred' modo & forma pred' *an Evidence.*
superius in Evidenc' ostens. minus sufficiens
in Lege existit ad proband' Exit' pred'
interius junct' ex parte ejusdem B. Quodq;
ipse ad materiam ill' in forma pred' in
Evidenc' ostens. necesse non habet nec
per Legem Terre tenetur respondere, Et
hoc paratus est verificare. Unde pro de-
fectu sufficien' Materie Jur' pred' in Evi-
denc'

denc' in hac parte ostens. Idem A. pet. Judicium, Et quod Fur' pred' de Veredicto suo super Exit' pred' reddend' exonerentur, & debitum suum infrascript' unacum dampn' suis occasione detention' debiti ill' sibi adjudicari, &c.

Joyneder in
Demurrer.

Et pred' B. ex quo ipse sufficien' Materiam in Lege ad manutenend' Exit' pred' ex parte ipsius B. Fur' pred' superius in Evidenc' ostens. quam ipse parat' est Verificare, quam quidem Materiam pred' A. non dedic' nec ad eam aliqualit' respond' Set Verification' ill' admittere omnino recusat pet' Judicium, Et quod pred' A. ab Actione sua pred' versus eum habend' precludatur. Ac quod Fur' pred' de Veredicto suo super Exit' pred' reddend' exonerentur, &c. Super quo Fur' predict' de aliquo Veredicto inde reddend' per Cur' hic ex assensu partium pred' exonerantur, &c.

If the Plaintiff in Evidence shew any Matter of Record, or Deeds, or Writings, or any Sentence in any Ecclesiastical Court, or other Matter of Evidence by Testimony of Witnesses, or otherwise, whereupon Doubt in Law arises, and the Defendant offer to Demur in Law upon the same ; the Plaintiff cannot refuse to joyn, or waive his Evidence : And so on the other party.

*Plaintiff must
joyn.*

And

And the Reason is, For that Matter in Law shall not be put in the Mouth of Lay-men. *Co. Rep. 5. fo. 104. Baker's Case.* But see after 

But the King in this Case is at liberty.

And if Evidence for the King in an Prerogative Information, or any other Suit, be del Roy. given, and the Defendant offer to Demur in Law upon the Evidence; the Kings Counsel in that Case shall not be forced to joyn in Demurser. But in that Case the Court may direct the Jury to find the Special Matter, 5 *Co.*

104. Dyer 53.

And also it's said, That upon such *Demurrer* a Demurrer (where the King is no *ver-ruled*. party) the party Demurred unto, may demand Judgment of the Court, Whether he ought to joyn in the Demurrer or not.

 For if there be not a Colourable  See above Matter for to ground the Demurrer upon, the Court will not force the party to joyn in it, but will over-rule it, *Pract. Reg. 83.*

Upon a Demurrer to an Evidence *Jury discharged* given to a Jury at a Tryal, the Jury are to be discharged, and not to pass upon the Tryal; but the Matter in Law (in question,) upon the Demurrer is referr'd to the Judges to determin.

The Plaintiff and Defendant must agree the matter of fact, &c.

But Quere, if not, whether there must not be a *Venire de novo*, See Pract. Reg. 83. Pasch. 23. Trin. 23. Car. B. R.

Action for deceit, in selling him 12 Trees. *Issue non Cul.*

The Return of
a Postea upon
Demurrer to
the Evidence.

Posteaq; scilicet die & loco infracontent' coram (&c. as in others usq;) Et Jur' Jurat' ill' similit' exact' videlicet, W. G. (&c.) Ven' ac in Jur' ill' jurat' existen' ad veritat' de infracontent' elect' triat' & Jurat' fuer', Qui quidem Jur' modo & forma pred' Jurat' existen', G. S. mil' Serviens ad Legem de Consilio pred' W. B. produxit quosdam, J. D. & T. E. ex parte Quer' ad proband, Exit' pred', Qui quidem J. D. Jurat' existen' dedit in Evidencij' Jur' pred' & Juravit in his Anglican' verbis, videlicet, That (&c. and so recites J. D.'s. Evidence) Et pred' T. E. Jurat' existen' dedit in Evidenc' Jur' pred' & Juravit in his Anglican' verbis, videlicet, That upon discourse, (&c. and so recites T. E.'s. Evidence.) Et superinde Hen. Pollexfen ex Consilio Def. dixit, Quod Materia pred' superius in Evidenc' dat' non fuit suffic' in Lege ad manutenend' Exit' pred', Et moratur in Lege super Evidenc' pred' Et hoc, &c. Et pet', &c. Et pred' Consil' ex parte pred' Quer' dixit, Quod fuit sufficiens in Lege Et hoc, &c. Et pet' &c. Super quo Jur' pred'

pred' super Sacram' suum' dic', Si Lex sit cum Quer', Quod pred' Def. est Cul. de infracontent' modo & forma prout pred', Quer' interius narravit Quodq; pred' Quer' occasione premis. sustinuit dampna ad 11 l. 10 s. ultra Mis. & Custag', Et pro Mis. & Cust' ill' ad 40 s. Et si Lex sit cum Def. Jur' pred' dicunt, Quod pred' Def. non est Cul. modo & forma prout pred' W. B. interius vers. eum queritur.

Pleadings must be certain, that the *Pleadings must be certain.* adverse party may know whereunto to answer, or else he were at a mischief, &c.

But this mischief is remedied by De- *Remedy by De-* murrer. *murrer.*

The Demurrer may be made either *When and to the Count or to the Plea, Replicati-* *where to De-* on, Rejoyneder, &c. Co. Lit. 71. *mur.*

For all parts of a Pleading to Issue, ought to be according to the Rules of the Law, and if any part fail, the whole is naught, Pract. Reg. 82. Mich. 23 Car. B. R.

All Demurrers alledge insufficiency in *All Demurrers* the other parties Pleading, &c. and say *are for the in-* that by Law it ought not to be an *sufficiency in* fswered, and therefore pray Judgment to *Pleadings.* be on the part of the Demurrant.

After the Demurrer is joyn'd, the Judges shall give Judgment according, as the very Right of the Cause and Matter in Law, shall appear, vid antea.

*After Demurrer
joyn'd, Judg-
ment and how.*

And therefore if that appears sufficient to the Court, which the Demurant called insufficient, then Judgment is against the Demurrant, as if it had passed against him by Verdict: And so on the contrary, if it appear insufficient to the Court, Judgment is then given against him who joyn'd in the Demurrer, and insisted that his Plea, &c. was sufficient.

*No Demurrer
after an Issue
joyn'd.*

After the Plaintiff and Defendant have joyn'd in the Issue, which is to be tried betwixt them, neither of them can demur without the consent of the other: For by their joining in the Issue, both parties have admitted the whole Pleadings to be good, as to try the Issue, *Pract. Reg. p. 84. Trin. 23. Car. B. R.*

This is when the Issue goes to the whole, no Demurrer after on the same Issue without consent, &c.

Repleader.

*Demurrer en-
tered cannot be
waived.*

No Repleader after Demurrer without Assent of the parties, *Plo. 179. 3 Co. 52.*

If a Demurrer be entered it cannot be waived, except both the Plaintiff and Defendant do consent unto it; Nor then without leave of the Court, *Pract. Reg. 82. Mich. 22. Car. B. R.*

A Demurrer cannot be upon a matter which requires no answer, *Plo. 91.*

If the Court do perceive that a Demurrer is put in only to put off a Tryal, or for delay of the proceedings, they will not allow of such a Demurrer, nor cause the other party to joyn in the Demurrer; But will give Judgment against the party, upon his *Frivolous Demurrer*, Reg. *Idem 82 Mich. 22. & 24. B. R.*

The party that is delayed in his proceedings by reason of a Demurrer, may move the Court to appoint a short day after, to hear Counsel speak to the Demurrer, and the Court will grant it, *Motion for a short day to speak to the Demurrer.*
Idem 83. Trin. 23. Car. B. R.

The manner of arguing Demurrer, and if the Judges be equal in Opinion,
I Inst. 71. b. & 72. a.

A General Demurrer doth not lye to a *Scire facias*, for it is in the nature of a Judicial Writ, *No Demurrer to a Scire facias.*
Idem 83. Pasc. 23. Car. B. R.

Where there ought to be alledged a place from whence the *Venire* should come, and it is not alledged, but omitted, and yet an Issue is joyn'd between the parties, and the *Venire* is from the Body of the County, the Defendant may demur upon the *Venire facias* if he will; but if he do not, but suffer the Tryal to pass, then 'tis a good Tryal, for he hath slipped his advantage of Demurrer, *Pract. Reg. 82. M. 22. Car. B. R.*

*Demurrer ad-
vantage slipt
by Pleading ill
a Special Plea,
where General
Plea might
have served.*

Where a Statute gives leave to plead generally, and the party waives this Leave and pleads specially, the other party may demur upon his Special Plea, if he see cause; for though he needed not to have pleaded specially, yet having done it, the Plea must be good at his own peril, *Idem 83. Pasch.* *23. Car. B. R.*

If the Defendant plead where he may Demur, he cannot take advantage in Arrest of Judgment, or by Writ of Error, *Plow. 182, 184.*

*Special Demur-
rer to a Neg-
ative pregnant.*

There must be a Special Demurrer to a Negative pregnant, which doth also contain in it an Affirmative; and also to an Argumentative Plea, which concludes nothing directly, but only by way of Argument or Reasoning; and to a double Plea; for a General Demurrer doth admit them to be good; for it doth not shew any fault in them, as a Special Demurrer doth, *Stile's Reg. 84.*

'Tis said the Plaintiff may be Non-Suit, after Demurrer joyn'd, *i Inst. 133. b.*

*Demurrer to
part, Plea to
part.*

One may demur to one part of a Declaration, and yet plead to the other part of it, with a *Quoad, &c.* Idem 84. *Mich. 23. Car. B. R.*

*Demurrer for
part, Issue for
part.*

If there be a Demurrer for part and Issue for part, the course is to argue the Demurrer first; and it ought so to be,

be, especially in an Action of the Case; because the Jury at the Trial may give entire Damages for the whole. But it is in the discretion of the Court to try the Issue first, *Co. Lit. 72.*

See *Pract. Reg. 166, & 167.*

One may demur to a Demurrer for the doubleness of it: But if he that ^{Demurrer to a} Demurrer, might demur, doth not demur to it, but joyns in the Demurrer, he hath slipt his advantage, *Idem 84. Mich. 23 Car. B.R.*

A Demurrer is double, when that he ^{Double Demur-} that doth demur doth affsign in his De-
murrer (for cause of it,) One Error in
Fact, and another Error in Law, to be
in the Plea upon which he demurs:
Which ought not to be done in one De-
murrer, *Idem 84. 23 Car.*

If *A.* plead, and *B.* demurs Specially; *Other Matter* now if *B.* will, he may at the Argument ^{besides that} specially shewn, of the Demurrer bring in any thing ^{may be alledg-} else that is naught in the Plea, notwithstanding the Causes shewn in the Spe-
cial Demurrer. For it may be he may Demurrer.
do it on purpose to make the party ^{But this must} believe, he knows no other fault than what
he hath then, and so catches him if
there is any other fault, *Ed. Saunders.*

See some Special Causes of Demur-
rer, before and after.

Demurrer must have Counsel's Hand. A Demurrer to any Plea ought to have Counsels hand , and by *Foster Chief Justice*, (If it be frivolous, he shall be Fined: But onⁿ Demurrer to a Declaration, by the Practice of the Court the Attorney's Hand is sufficient; but if that be good, and the Demurrer frivolous to the Declaration , the Attorney shall be Fined.) But *per Cur'* neither ought to be without Counsels Hand, or without Warrant from him particularly ; and that he that doth otherwise shall be turned out of the Roll , and pay Costs , as the Counsel should do, if he demurr'd frivolously, 1 Keb. 38.

Nota.
No Judgment for want of Counsel's Hand to Special Plea, without leave of the Secondary.

But Note, It was said by *Roll Chief Justice*, That a Special Plea is a Plea, although it have not a Counsellor's Hand set to it: And therefore Judgment cannot be entred for want of a Plea, although a Counsellor's Hand be not to it, without acquainting the Secondary of the Office , and obtaining his leave to do it. For it may be there was no Cause for a Special Plea ; and the Plaintiff must not be his own Judge. *Prat. Reg. p. 246.*

But *Quare of this.*

Nil dicit.

Nil dicit is a failing to put in an Answer to the Plea of the Plaintiff, in an Action , by the day assinged : And Judgment shall pass against him that

that faileth, because he saith nothing to the contrary ; and this is always peremptory and Bar to the Action for ever, *Finch's Law* 428. /

But see more concerning this Judgment by *Nihil dicit*, in *Pract. Reg.* 169, 170.

The Court will not Reverse a Judgment, which is given upon a *Nihil dicit*, and by the Rules of Court. But by the Consent of the Plaintiff and Defendant, the Court will grant a Repleader in the Case. *Id. ibid.*

Trin. 33 Car. 2, ro. 93. Warren versus Afters.

Trespass with Cattel, and breaking down Hedges, &c.

Defendant justifies by a Reservation in a Demise, to cut up and carry away Trees, &c. *pred. W.M. reparan' & emenden' sepes ubi arbores ill' sic succis. effent, &c.*

Plaintiff demurs, *Et pro Causis, viz. For want of Quod in placit' pred' non allegatur, quod se- Averment. pes & foveæ pred' fuer' reparat' & implet' secundum concession' Agreement, & Licenc' pred' ac etiam quod non verificat' quod pred' prostrac' sepium ex causa pred' est eadem unde pred' E. superius narravit, quod secundum formam placitandi verifi- care debuit.*

Hen. Poll exfen.

Mich.

Mich. 30 Car. 2. Dobyn versus Ofwald.

*For Uncertainty
and want of
sufficient Allegation.*

Demurrer, *Et pro Causis Eo quod non allegat' in placito pred' quod pred' octo Acre de novo assign' & pred' due Acre fuer' parcel' alicujus m' tenementi sed olim fuer' spectan' sive pertinen' ad Messuag' sive tenementum quod est incertu' de quo tempore intenditur, Et pratum non potest pertinere ad Messuag' sive tenementum, &c.*

Hen. Pollexfen.

The Action is in Trespass.

Defendants justifie for taking a Load of Hay ; for that the Parish of *M.* time out of mind was within the Rectory of *W.* within which Rectory pred' tempore quo fuer' separal' parcel' prati voc' [Whole Tithe Meadow,] ad separal' antiqua Mess. sive tenementa infra eand. Rectoriam olim spectan' & pertinen'; and a Custom, That if any of the Occupiers should Mow, &c. the Proprietors to have 2 d. an Acre, &c. but if they should Mow the whole 10 Acres, then to take a whole Load from any part, &c. and so justifie.

Meadow in Law cannot belong to a Messuage. We are not in Cases of a Grant, but Pleading. *Hill and Grang's Case, Com. 168, 169.* It may be part of a Tenement; *Chose Corporeal ne poet appertain a chose Corporeal.*

Affault

Assault and Battery, and taking Nine pounds of Butter from the Plaintiffs Servant.

Defendants justifie as Clerks of the Market of the City of *Litchfield*, they were authorized to enquire after Butter, and if deficient (according to the Assize) to seize it, &c. That the Assize for Butter was then, That every Pound should contain 18 Ounces ; that the Plaintiffs Butter was but 16, and that therefore they seized it, &c.

Demurrer, *Et pro Causis*, For that by the Statute of *Magna Charta* there ought to be *Unum pondus* throughout England, *Stat. 14 Ed. 3. ca. 12. & 27 E. 3. ca. 10.*

By this means the City of *Litchfield* might buy Butter, each Pound 18 Ounces, and at the next Market sell but 16.

Trin. 24 Car. 2. Dixon against Thompson, For maliciously levying a Plaintiff in the Mayor's Court of the City of *Bristol*, against the Plaintiff, whereby he was taken, imprisoned, and forced to pawn his Goods, &c.

Defendant pleads, That he was then *For not shewing* duly Indebted unto him in 62 l.&c. then *good Cause of* Action, and *for bringing* due and unpaid.

Quer' moratur in Lege, Et pro Causis, Action before *Eo quod pred' W. per Placitum suum pred' the Money due.*

*non affirmat se temporibus prosecuc' & ar-
restrac' pred' habuisse aliquam justam cau-
sam Action' versus pred' A. nec potuit idem
A. indebitat esse eidem W. temporibus illis
in pred' pecunie summa, que non fuit solu-
bilis ei nisi ad tempus tunc longe futur', Et
quia Placitum illud implicativum est, &
attinet solummodo ad Exit', &c.*

W. Pawlett.

The Defendant jons.

*Rosier versus Jones in Communi Banco.
Detinue of a Cow apud D, &c. in quo-
dam loco ibidem Voc' L.*

*For that the
Plea of Tenure
is insufficient
in Avowry.*

Defendants plead, That they took her in quodam Clauſo voc' M. and traverse the place called L. & pet' Judic' de Narr', &c. Et pro return' Vacc', they avow as Bayliffs of W. R. for Rent arrear from the Plaintiff.

Plaintiff pleads, That the place in quo, &c. is called as well by the name of L. as M. And pleads further, That he held not of the said W. R. and disclaims so to hold. Et pet' Judic' & dampna, &c.

Defendant Demurrs, Et pro Causis, Eo quod Placitum predict' in barr' cognic' pred. superius Placitat' est insufficiens, Quia Cognic. pred. est fact' super Terras infra feod' & Dom' pred' W. R. Et pred. locus in quo sit infra feodium & Domin' ipsius W. Et non est material' quis est tenens inde, Ac etiam eo quod General' Placit',

*Placit', Quod non tenet est insufficiens in
Legi.*

Hen. Pollexfen.

Def. moratur in Lege sur Narr' sur Po- For not shewing
licy de Assurance, Quod pred. G. non mon- he had any
stravit Cur' bic per Narr' suam pred. quod reasonable
ipse idem G. tempore confec' script' Asse- Cause to Assure
curanc' pred. habuit aliquod interesse vel the Ship.
concern' in Nave predict. vel in Apparatu
suo, vel quod ipse idem G. tunc habuit ali-
quam rationabilem Causam facere Assur-
anc' super eandem Navem, Et quod Narr'
pred. est duplex incert' & caret forma,
&c.

Ri. Collins.

Plaintiff declares, That the Defendant never was educated in the Trade ^{murrer to an} of a *Hot-Presser*, as Apprentice for 7 years; nor that the 12 Jan. 5 Eliz. a ^{Action for using Trade against Stat.} Hot-Presser was not a Trade used in this Kingdom.

Defendant demurs generally, and &c. the Plaintiff rejoyns.

Cur'. Special Demurrer to a Declaration for using the Trade of a *Throwster*; and sets forth, that it was not a Trade within the meaning of the Act, and Judgment pro. Def.

But we conceive, the Defendant hath admitted a *Hot-Presser* to be a Trade by the General Demurrer, *Trin. 36 Car. 2. Dom' Rex & Smith versus English
Vide*

Vide Stat. 3 & 4 E. 6. ca. 10, 21. 5 &
6 E. 6. ca. 6. 1 Roll. Rep. 312. Edward's
Case. Mr. Eyton.

*General Demurrer good,
for not mentioning the
Consideration in a Plea of
a Bargain, and Sale.*

If a man plead a Bargain and Sale, and mention no Consideration; or when one pleads a Fine, he says, *Quidam Finis se levavit in Curia Dom. Regis*, not saying in what Court, it doth not appear in what Court it is; therefore in both these Cases you may demur generally.

Ed. Saunders.

Note, For it is Substance; Where the Defendant concludes his Plea, *Et hoc parat' est verificare*, when he should conclude to the Country, General Demurfer is sufficient, 1 Cro. 164. Yelv. 137.

Demurr^r cum Causis.

*Action sur Assumpsi^t, to pay the Debt
of a third person.*

Special Causes,
For that there
was no Memorandum, &c. to
pay the Debt
of a third per-
son, according
to the Statue.

Demurrer, *Et pro Causis, viz. Quod non apparent per Narr^r pred. quod est ali- quod Memorandum aut promiss^s in Narr^r pred. specificat^r in script^r signat^r per ipsum A. aut aliquam al^r person^r per ipsum A. legalit^r autorizat^r prout debuit secundum formam Stat^r in hujusmodi Casu nuper edit^r & provis. Et quod Narr^r pred. est incert^r insufficiens & caret forma, &c.*

J. Tremayne.

Hampson versus Clerke, Trin. 26. Car. 2.
Debt upon four severall Bond.

Defendant

Defendant pleads an Agreement *For want of sufficient Allegation* under the Plaintiff's Hand and Seal, and an acknowledgment of Satisfaction.

Quer' Demurr', Eo quod predict' G. per Placitum suum pred. non demonstrat Cur' bic, Quod pred. H. cogn' se agreeasse cum pred. G. vel recepisse Satisfaction' de prefat' G. pro vel de predict' denar' sum' superius petit' sive tangen' vel concernen' eandem sum' vel causam Action' eidem H. pro non soluc' inde ascrescen', &c.

Cook versus Whorwood, Hill. 22 & 23 Car. 2.

Def. pleads Protest and That the Arbitrators made no Arbitration *pro Placito dic'*, *Quod pred. W. L. Umpirator pred. in Narr' pred. superius nominat' non fecit ali quod umpiragium suum int' Partes pred. de & super premissis superius pred. modo & forma prout pred. E. superius inde narravit, Et hoc parat' est verificare, Unde pet' Judic' si pred. E. Action', &c.* Ri. Powell.

Quer' moratur in Lege, Et pro Causis, For not concluding the Plea Quod pred. F. non conclusit Placitum suum ad Patriam prout per Legem hujus regni to the Country. Anglie debuit, &c. Ed. Saunders.

Debt upon Penalty in Articles.

After Imparlane, Defendants plead, *That semper parat' fuer' ad solvend', &c.* *For pleading Semper paratus Quer' moratur. Et pro Causis, Quod after Impar lance. Placitum ill' placuit, post Licenc' inter lance. loquend' dat', In quo casu manifeste apparat*

I. quod

Rules for Demurrers.

quod Def. non fuer' semper parat' ad denar' il' solvend'. Jo. Tremayne.

Newton Barr' versus Creswick & al',
Trin. 3. Fac. 2. ro. 436. For exhibiting a
Petition to the King and Council a-
gainst the Plaintiff, &c.

Defendants plead over the Matter
of the Petition , and then say, That
for those Reasons they exhibited the
Petition, &c. to inform the King and
Council, &c. as they might , as as by
the duty of their Office they were bound

J. Holt.

For Incertainty
and not ten-
dering the Ge-
neral Issue.

*Quer' demurr', Et pro Causis, Quod Pla-
citum predict' continet generale quid , par-
ticulare nichil, sed omnino incertum & ve-
nit ad general' Exit', Quo Casu General'
Exit' placitari debuit. Judic' pro Quer.*

H. Pollexfen.

The same Action, Plea, and Demur-
rer, as int' Hart and Creswick, in which
was Judgment given in Easter Term
last.

For not An-
swering the
Matter in the
Declaration.

*Et pro Causis, videlicet, Quod predict'
J. F. in Placito pred. non respondit ad ma-
teriam in Narr' pred. menc', scilicet , pro-
jection' tritici in lutum, sed subdole evadit
Materiam il', Ac non dicit an projectit in
lutum unum modum tritici vel aliquid tri-
tici omnino, Ac etiam quod posit' & locat'
in terram non est project' in Lutum per quod
tritic' spoliat' fuit in Narr' pred. spec' Et
hoc, &c.*

H. Pollexfen.

Pitt

Pitt Ar^r versus Fosset, Hill. 31 & 32

Car. 2.

*Et pro Causis, Eo quod Placitum pred. For that the
sic ut prefertur modo & forma pred. per Plea is double,
pred. A. superius repl' placitat' est duplex, and for Incer-
& duas continet materias, Quam aliquia
un' per se solum sufficiebat ad action' pred.
manuteneb', Acetiam quad separal' tra-
vers. pred. extra placitum pred. omitti de-
buer', Acetiam quod placitum pred. incer-
tam existit & caret forma, &c.*

*Et pro Causis, Eo quod non constat per not making
placitum pred. superius replicando placitat' Demand ac-
quod aliqua legitima demand' denar' pred. according to the
fact. fuit infra pred. quintum Annum in Indenture.
Conditione Indentur' pred. superius ment'
prout infra idem tempus juxta formam &
effect' Indentur' pred. fieri debuisset. Q.
jung.*

*Et quod per placitum titul' Mater' tra- For Incertainty,
versatur qual' in placito Barr' ipsius J. S. and traversing
pred. nomine content' existit, Acetiam quod the Matter now
pred. placitum il' incertum & pregnans contained in
existit, &c.*

*Eo quod Repl' il' continet in se separa- For Incertainty
les & multifarias Materias triabiles per and Mul-
tipli- Record', Ubi per Narr' pred. Causa Action' city.
pred. J. W. petit' non insistitur vel allega-
tur, ut Materia de Record' existen', Ac
quod placitum il' est duplex & incertum &
minime triable ac caret form', &c.*

For concluding with Averment, videlicet, Quod Repl' ill' concluditur pro verificatione inde ubi concludi debuisset ad exitum.

T. H.

The like.

Eo quod Placitum illud verificatur, &c. ubi concludi debuit ad Patriam.

Jeffreys.

For Incertainty, Duplicity, and net concluding to the Country.

Eo quod prefat' Exit' per prefat' E. superius replicatione junct' existit super pred' placitum pred' J. Et tamen pred. E. non concludit super Exit' ill'. Et hoc pet' quod inquiratur per Patriam. Et eo quod idem placitum pred' E. superius replicand' placitat' continet in se dupl. & insufficien' materiam, &c. Judic' pro Quer' sur morat?

Henden.

For Traversing a Matter not traversable.

Eo quod pred' H. per Placitum suum pred. dedic' & traversat' reversionem pred' quinque acrarum Pasture cum pertin' in quibus, &c. prefat' B. B. H. B. N. B. & W. B. spectare, que quidem materia in hoc Casu per Legem terre traversabilis non existit. Judic' pro Quer'.

Note, That in Turner against Burden, Hil. 2 Car. R. ro. 1941. in Replevin.

Plaintiff pleaded Feoffment to the use of Husband and Wife, and the Heirs of Husband per le Wife, &c. and that they had Issue B. B. H. B. N. B. and W. B. and that after Husband's death the Wife was feised in feodo talliato & jure Reversion' prefat' B. H. N. & W. filiis pred. H. patris & haered. suis spetan'

spectan^d eo quod the place in quo, &c.
sunt & tempore, (&c.) fuer^d de tenura &
natura de Gavelkind secundum cons. in
Com^d pred. a tempore quo non extat, &c. par-
tit^d & partibil^d int^d bæred^d mascul^d, &c.
Et Def. traverse, ut supra. Et Quer^d Dem^d
ut supra.

Godfrey versus Hawkins Sen^d.

Quer^d moratur in Lege ad placitum Def. For pleading
& quoad caption^d & asportac^d predict^d another Action
quatuor afferum & duarum caretat^d depending,
Feni parcel^d pred^d Feni in pred. Bill^d ipsius which was
quer^d menc^d & conversion^d & disposition^d commenced at
corundem quatuor afferum & duarum ca- with the Action
rectat^d Feni in usum ipsius Def. modo & brought, and
forma pred^d placitat^d in cassac^d predict^d A- ought not to be
ction^d Transgr^d ipsius Quer^d placitari mi- pleaded the
nime debet, Quia Actio pred^d placitat^d in same Term.
satisfaction^d Action^d Transgr^d ipsius Quer^d
quoad caption^d & asportac^d pred^d quatuor
afferum & duarum caretat^d Feni pre-
dict^d triu^d caretat^d Feni parcel^d in pred^d
Bill^d ipsius Quer^d menc^d est Actio sur Tro-
ver & Conversion^d & impetrat^d fuit eod.
die quo pred. Act^d Transgr^d ipsius Quer^d
impetrat^d fuit, & non debet placitari eod^d
Termino.

Et pro Causis, Eo quod pred^d placitum For that the
pred^d J. rejunendo placitat^d est decessus à Rejoynder is a
Barr^d ejusdem J. Quodque placitum ill^d est Departure
vitiosum incert^d insufficiens in se & caret from the Bar.
forma, &c.

For offering an Eo qd' R. offert Exit' in Com. Ebor,
Issue in a wrong Qui triari debuit in Lond', & hoc, &c.
County.

Feame & Feame. Pet' Licenc' interlo-
quend' usque Oft' Hill. and then pleads,
Action non, and that the Obligor died
Intestate, *babens diversa bona notabilia* ;
and that Administration was granted to
her *Absque hoc, &c.* Hen. Windows.

For pleading in
Bar of Action,
when he should
have pleaded
in Abatement
of the Bill.

Demurs, *Et pro Causis*, For that the
Defendant hath pleaded in Bar to the
Action, where she ought to have plead-
ed in Abatement of the Bill ; and for
that the Substance of the Plea being in
Abatement, she hath pleaded it after
Imparience. R. Wallys.

For the like.

Page against Hunter. Pleads *Action
non ut Exec'*, *Quia le* Obligor died Inte-
state , and Administration *Absque hoc*,
that he Administred as Executor.

I conceive that the Plea was good in
Abatement , but being pleaded in
Bar is naught. H.Pollexfen.

Bealy versus Sampson, Trin. 4 Jac.
2. R.

Replevin of Cattel, &c. Defendant
justifies by Warrant, dat' 2 Aug. ret'
Quinden' Martin' Anno tertio, &c. *Absq;*
hoc, That he was Guilty before the
said 2 Aug. or after the said *Quind'*
Martini.

Quer' Demarr', *Et pro Causis, viz. Quod*
placitum pred' male traversat Mater' &
tempus in ea parte traversat', ac Travers.
ill'

For not well
Traversing of
the time, and
for alledging a
thing against

Law.

ill^e extra idem placitum omitti debuisset, si non idem placitum traversasset tempus inter pred. secundum diem Augusti, & pred' Quinden' Martini in eod³ placito menc'. Item quod placitum pred. suppon' Averia pred' imparcari quoque summa i i l. ad usum dicti Vic³ solut' fuit, Ubi revera dictus Vic³ bujusmodi sum' ad usum ipsius Vic³ per Legem terre recipere non potuit.

Trin. 35 Car. 2. Dellingham against Wells, &c. for taking away the Plaintiffs Goods.

Defendants plead, That Wells levied a Plaintiff in the Sheriffs Court against one E. C. who had the Goods in possession, and that by virtue of a Replevin they took them, &c. and that the Goods in the Sheriffs Court and in the Narr' are the same.

Plaintiff demurs, Et pro Causis, Eo for that the quod placitum pred. non confitetur nec de- Plea neither negat Bona & Catalla pred. fore J. D. nec confesseth, nor monstrat aliquem titulum pred. J. W. ad avoideth. babend^d bon^e ill^e. H. Pollexfen.

In Transgr^d Parker versus Hele, Hil.
2 & 3 Jac. 2. ro. 688.

Eo quod predict^d S. non monstrat aliquid For not making Titulum vel justam causam pro averiss Title, nor An- suis ire in commun^d Via pred^d nec aliquid re- swering the spond^d ad vagrantiam & errac^d averior^d Master. ill^e in Via ill^e. H. Pollexfen.

In Transgr^r. Mathews versus Cary;
For taking a Silver Tankard.

Def. pleads, That the Plaintiff was presented at Westminster for a Nusance, &c.

The Repl^r was, *De injur^r sua propria,*
and traverses the melting Tallow to a Nusance.

For Traversing
a Matter not
traversable.

Eo quod pred' R. per placitum suum pred'
traversat Mater^r in Barr' ipsorum E. M.
& M. non affirmat' seu allegat' seu per
Legem traversabil'. Et pro eo quod idem
R. non respond' ad Mater^r in barra pla-
citat'. Hen. Pollexfen.

For that the
Rejoyneder de-
parts from the
Plea.

Et pro Causis, Quod pred' Def. per pla-
citum suum pred' rejungend' placitat' à
priori placito suo pred' recedit, Et quod pla-
citum ill' incert' insufficien' existit & caret
forma, &c. Ed. Saunders.

For want of
Efficient Alle-
gation and
Form, &c.

Eo quod Def. non bene allegaver^r in pla-
cito suo predict' quod manucapt' in placito
suo pred. superius menc' fuer^r sufficien' Ma-
nucaptores, sed per implicac' & non positive,
Ac pro eo quod placitum pred' caret for-
ma, &c.

Vid 3 Cro. 460, 852. Mo. pl. 596.

For not An-
swering the
Matter in the
Bar.

Defendant, as Executor, pleads 10 se-
veral Judgments.

Plaintiff replies to one, and that it was kept on foot to defraud the Plaintiff.

Defendant demurs, and shews for Cause, That the Plaintiff hath given no Answer

Answer to any of the other Judgments.

H. P.

But Judgment for the Plaintiff, That Replication is good.

Cary against Baccus.

The Plaintiff as Bayliff of the Liberty of Westminster declares against Defendant for entring his Franchise, and levying Goods by virtue of a Testat Fi. Fa. directed to the Sheriff of Middlesex, &c.

Def. Demurr', Eo quod per Narr' pred' non apparent quomodo predict' E. seisit. fuit his Right and de pred' offic' ballivi Franches. in Narr' Title. pred' spec' nec quod jus vel Titulum idem E. habuit in eo Offic'. Et quod Narr' ill' est incerta insufficien' & caret forma, &c.

S. Ward.

Et pro Causis, Eo quod predict' S. per redundancy Repl', &c. recessit ab Exit int' ipsum S. & and departing prefat' N. W. R. & W. superius junct' & from the Issue. non directe respond' ad Materiam per ipsum J. R. disjunctim placitat' & quod est in se redund' & caret forma.

Smith versus Darell. Trover.

Eo quod placitum predict' tendit ad Ge- For Incertainty neral' Exit' solummodo & General' Exit' &c. and not placitari debuit, Quodque placitum pred' est ^{tending the} General Issue. incertum duplex & caret forma, &c.

W. Thompson.

Mich.

Mich. 2 Jas. Moor versus Kirby. Assault.

Justify per Precept' from Admiralty.

For not shewing
the Cause of
the Warrant,
whereby he
justifies, &c.

*Eo quod non ostendit quod fuit aliqua
Causa vel materia surgens infra Jur' Cur'
Admiral' vel pro qua re Warr' sive Arrest'
pred' fuit nec quo die vel quando duxit cor-
pus predict' J. coram Surrogat'.*

H. Pollexfen.

For that the
Plea does nei-
ther Confess or
Avoid.

*Eo quod placitum pred' R. est Argument'
& non cogn' evad' vel contradic' materi-
am in Narr' pred' J. content' ac est incert'
duplex & caret forma, &c.*

W. Jones.

For thgt the
inducement to
the Traverse
confesses the
Cause of Action
and traverses
what is not
traversable,
and is a Neg-
ative pregnant.

*Eo quod inductio ipsius N. ad Traversi-
am suam continet materiam confiten' cau-
sam Action' ipsius J. Ac eo quod pred' N.
traversat mater' minime traversabil' vel
allegat per prefat' J. in Billa sua pred', Ac
eo quod placitum ill' est negativum preg-
nans & attingens solummodo ad General'
Exit'.*

Quer' moratur.

Judgment by
Nil dicit ro
Demurrer.

*Super quo predict' Def. nichil ad pred'
morac' in Lege pred' J. superius ad barram
respons. pred' E. superius placitat' dicit, per
quod idem J. reman' versus prefat' E. inde
indefens.*

*Ideo cons. est, Quod pred. J. recuperet
versus prefat' E. debitum suum pred' &
dampna sua occasione detenç' Debiti ill' ad
20s. eidem J. ex assensu suo per Cur' hic
adjudicat', Et pred' E. in Misericordia, &c.*

By

By this it appears, That though a General Demurrer prevaileth not where the Insufficiency is only want of Form; yet this want of Form is most commonly made one of the Causes of a Special Demurrer. For the Judge is to have no regard to want of Form, &c. but only to such Causes as the party demurring shall particularly set down, &c.

C H A P. V.

XII Rules in Pleading.

I. **A**cts and Statutes in Pleading need not be recited wholly, <sup>Acts and Sta.
tutes pleaded.</sup> only the particular Branch that concerns the Matter in hand; because every Branch is an Act of it self. But otherwise of a Record; for that is grounded upon an Original Judgment, and ought therefore to be entirely recited when pleaded in Bar. *Touch. of Prec. 186.*

II. Pleadings must be certain, That the Adverse party may know whereunto to Answer; or else he where at a Mischief, which Mischief is remedied by Demurrer. *Idem 186.*

III. In

*Imperfections
of Pleading.*

III. In all Imperfections of Pleading, whether it be in ambiguity of Words and double Intendments, or want of Certainty and Averments, the Plea shall be strictly and strongly taken against him that pleads it, *Touch. of Prec.* p. 189.

See there the Example.

*Ambiguities
that grow by
References.*

IV. So upon Ambiguities, that grow by References.

If an Action of Debt be brought against *J. E.* and *J. B.* Sheriffs of *London*, upon an Escape, and the Plaintiff doth declare upon an Execution by force of Recovery in the Prison of *Ludgate*, *sub Custod' J. S. & J. D.* then Sheriffs in *1 H. 8.* and that he so continued *sub Custodia J. B. & J. G.* in *2 H. 8.* and so continued in *Custodia J. F. & J. P.* in *3 H. 8.* and then was suffered to escape.

J. F. and *J. P.* plead, That before the Escape, at such a Day *Anno superius in Narr' specificat'*, *J. S.* and *J. T.* *adtunc Vic'* suffered him to Escape.

This is no good Plea, because there be 3 Years specified in the Declaration, and it shall be hardest taken, that 'twas 2 or *3 H. 8.* when *J. S.* and *J. D.* were out of Office: And the *adtunc Vic'* will not help them, though it seems by Intend-

Intendment, but the Year must be alledged *en fait*. *Dyer* 66. *Touchstone of Prec.* 190.

V. For uncertainty of Intendment. *Incertainty of Intendment.*
If a Warranty Collateral be pleaded in Bar; and the Plaintiff by Replication (to avoid the Warranty) saith, he entred upon the Possession of the Defendant.

Non constat, Whether this Entry was in the Life time of the Anncestor, or after the Warranty descended; and therefore it shall be taken in the strictest sense, That it was after the Warranty descended, if it be not otherwise averr'd, 3 *H.* 7. 2, 3. *Plow.* 46. a.

So for Impropriety of Words, 38 *H.* 6. a. b. 39 *H.* 6. 56. *Touchstone of Prec.* 191.

See there the Example:

VI. For Repugnancy in Pleading, *Repugnancy in Pleadings.*
Touch. Prec. 192.

See there the Example.

VII. A Bar may be good to a Common intent, though not to every intent, *Bar.*
Idem 192.

See there the Example.

*A man need
not disclose
that which
is against
himself.*

VIII. In Pleading, a man shall not disclose that which is against himself: And therefore if it be Matter that is to be set forth on the other side, then the Plea shall not be taken in the hardest sense, but in the most beneficial, and to be left unto the contrary part to be alledged, *Dyer 16, 17. Touchst. of Prec. 193.*

See there the Example.

*Outlary plead.
ed.*

IX. The Defendant may plead an Outlary in disability of the Plaintiff before Imparlane; but after Imparlane he cannot plead in Disability of the person, but he may plead in Bar of the Action, *32 H. 6. 33. 35. H. 6. 36. Touchst. of Prec. 196.*

See there the Example.

If a man pleadeth, That the Plaintiff is an Alien born, or Outlawed, he may conclude either to the Writ, or to the Action, *32 H. 6. 27.*

*Misrecital of
General Act of
Parliament.*

X. If a man plead a General Act of Parliament, and misrecite the same; yet it shall not prejudice him, because the Judges ought to take notice of it, *Per totam Curiam. Et Nul tiel Record* cannot be pleaded against a General Act of Parliament, although it cannot be found, *per Coke Ch. Justice, Touch. Prec. 198.*

XI. Note,

XI. Note by all the Justices for a Rule of *Transversus*.
General Rule, where a thing alledged
doth confess and avoid my Plea, I may
Traverse it, 7 H. 6. 13 Eliz. Dyer.
Touch. Prec. 199.

In a Plea you must never conclude a
Traverse, *Et do hoc propter se super Patriam* ;
and if it be so pleaded, Demur speci-
ally, and shew it. *Ed. Saund.*

Vide ante 78, 111. & postea.

XII. In all Pleadings where you claim *Legatee propter*
as Legatee, you must surmise the *Consent of Executor*,
of the Executor ; as, *Cui quidem di-
missioni idem J. S. consentivit, &c. Touch.
Prec. 203.*

Note, That while the Pleadings are *Reference*,
in Paper, one may have a Reference to
the Secondary, on a Suggestion, that
he will pay whatever is due ; but after
Judgment, nothing will be stay'd on
such Motion, *Pasc. 13 Car. 2. 1 Keb. 12.*

Many

Many other Special Rules and Matters for Pleadings, Alphabetically digested.

Abatement.

Abatement, See *Touch. Prec.* from p. 1 to 20, *vide postea.*

Advantage.

Accord and Satisfaction, *vide postea.* He that in Pleading will take advantage of a particular Statute, must shew particularly, that he is comprised within the Statute, *Pract. Reg. 33.*

Arbitrament.

In Arbitrament to make an end of all Matters between 3 parties, and they make an end only between 2.

*Mr. Latch his
opinion to draw
a Bar to a Bond
for performance
of an Award.*

Let the Defendant demand Oyer of the Condition, and then set forth, that the Arbitrators made a certain Writing, purporting an Award under their hands, &c. in *hec verba.* But the Defendant saith, that at the time of the Submission and Writing, purporting an Award made, there was a difference, and demand made by the said *W.* Obligee, against the said *R.* one of the Obligors, for and concerning, &c. Which difference and demand was submitted by the said Submission, to the said Arbitrators and notified to them, of which Matter of difference and demand, nevertheless they have made no Award, but left the said *A.* still subject

subject to be sued in the said demand,
not Arbitrated, *Et Judgment si Actio,*
&c.

Arbitrament is no Plea, after the last
Continuance, 21 H. 7. 33.

If all the Matters submitted to the Arbitrators be not Awarded upon the Award it is not good, *Pract. Reg. 27.*

A Tenant for Life may pray in Aid, *Aid.*
of all such persons as are in Remainder
of Estate of the Lands for which he is
Impleaded, *Idem 38.*

Stephens against Elrick, Hill. 26. Car. 2.
& 1 Jac. 2. Co. 354.

An Apprentice brings his Action, *Apprentice.*
for not instructing him, against his
Master.

The Defendant pleads, he turned him
away because he imbezled his goods.

Pollexfen, Shall we be bound to keep
him that imbezels our goods? *Per Cur.*
you shall, for you may have your A-
ction, and so may he for your not in-
structing him.

Administration, Where one pleads *Administration*
Letters of Administration which are
granted by such an Ordinary, where-
of the Law doth take notice, he may
plead, that they were granted unto
him *debito more*; But if they be granted
by an inferior Ordinary, of whom
the Law doth not take notice, he
must plead, that they were granted

M unto

unto him, *per Ordinariu' illius Loci, Pra& Reg. 135.*

Where the Payment of Money would not be for the advantage of the Testator, there the not paying of it cannot be pleaded, to be to the Retarding of the Administration of his Goods and Chattels, *Idem pag. 21.*

Defendant pleads *plene Administravit.* Repl. *Quod quer' tulit prius Origin' super quo Def. fuit waviat' & waviar' fuit reversat' pro insufficienc' inde, Et quod die prosecution' prioris Brevis Def. habuit Assets.* Ash 230.

Note. Such Replication may be concluded to the Country, but the certainest way is to say, *Et hoc paratus est verificare, &c.* 2 Cro. 590.

Amends.

Tender of Amends before Distress for Damage feasant makes the Distress tortious; and where Trespass is involuntary, the Defendant may disclaim and tender amends, which is a good Bar in the Action: And if Verdict pass for the Defendant, or Plaintiff be Non-suit, it is a perpetual Bar by the Act, 21 Jac. Ca. 16. 2 Inst. 107. 8 Co. 117.

Attornment.

In Pleading Feoffment of a Mannor you need not to alledge Attornment of the Tenants of the Mannor, but 'tis to be alledged by the other party. When the Services of any Tenant come in

in question, it is a sure way to alledge Attornment, otherwise it is ill, Co. Lit.

310. 6 Co. 9. 3 Cro. 401. Yelv. 135.
8 Co. 82.

In the Pleading Attornment it is sufficient to say, *ad quam quidem Concessiōnem il se Attornavit*, without mentioning the Attornment to be to the Grantee or any other, 1 Cro. 441.

In Pleading Attainder *Virtute Cōm Attainder. missiōnis*, and not said *sub magno Sigillo Anglie*, is good, 1 Cro. 461.

If in Appeal the Defendant plead in *Appeal.* Abatement of the Writ, and the Writ be adjudged good, it is peremptory, and he shall not be permitted to answer over; but shall be condemned upon the Writ, Pract. Reg. 33.

To an Action for scandalous words, *Alicz.* 'tis no Plea, that the Plaintiff is an *Alienigena natus in partibus transmarinis extra Ligeanc' Dom. Reg. &c.* Yelv. 199.

1 Bul. 134.

Fuit & ad huc existit sefītus, is sufficient Averment of Life in a Count, Dyer 304. a. Rol. 50.

One may aver what day the Deed was inrolled, 4 Co. 71.

Where a Statute is recited, there one may not aver, that there is no such Record, *vide antea*, 102.

When a Bargain and Sale is mentioned to be made for good consideration, it may be averred that the Money was paid, 2 Co. 76. M. 569. 1 Co. 176.

[*Licet*] is sufficient Averment in Pleading, and when joyn'd with the time and place certain, is Issuable, *Yelv.* 121. *Plow.* 127. b.

Avowry.

Defendant makes Conufance as Servant to another, and good, *Rast.* 555.

If one Avow for two Causes, and can maintain the Avowry but for one, yet good, *Pract. Reg.* 20.

Avowry for a Rent charge created by Fine and Deed, due above 40 years since, upon Lands charged with Distress.

Defendant Pleads the Statute 32 H. 8.ca. 2. of limiting Avowries for Rents to seisin within 40 years, 8 Co. 64. 10 Co. 108.

Bargain and Sale.

Bargain and Sale, in Pleading thereof, he ought to say *pro quadam pecunie summa*, otherwise it is ill, 1 Len. 170.

Briefs and Warrants pleaded, the Defendant ought to say, that the Warrant was in writing: But if he say *quod cepis Virtate Warranti in Scriptis, &c.* 'tis implied, that 'twas in writing, 3 Co. 44.

'Tis

'Tis not necessary to say, that the Writ was return'd when the Bayliff justifies *Virtute inde, &c.* but when the Sheriff himself justifies 'tis necessary; neither is it necessary when one pleads, that the Debt was levied upon him by *Fieri facias, Ca. Sa. &c.* 1 Cro. 447. 5 Co. 9.

In Trespass Defendant justifies in *auxilium Ballivi qui arrest' quer' Virtute Waranti super Latitat,* and detained him until he was discharged; 'tis not necessary in such Case to shew in the Plea, that the Sheriff had returned the Writ, 1 Cro. 447. 2 Cro. 372. 3 Cro. 181. *fon.* 179. 2 Rol. 563 *con.*

Condition may be pleaded without Deed, of Things and Contracts that are without Deed, *Inst. 225. b.*

Condition of an Obligation to pay Mony 31 Sept. Defendant pleads payment at the day; Verdict that it was not paid at the day nor before; Judgment for the Plaintiff, 1 Cro. 78. 1 Inst. 206. 2 Cro. 5. a.

Condition that he shall permit his Wife to make a Will of his Goods to 100 l. to be paid within a year; In Pleading thereof he ought to say, that he had paid the Mony, otherwise 'tis ill, 1 Cro. 597, 220. 2 Rol. 248.

Conditions per-
formed.

Court.

Conditions performed, See many
good Cases, *Plow. 291. a.*

Although one plead in disallowance
of the Jurisdiction of a Court, yet he
may afterwards come in and allow the
Jurisdiction and plead there, *Pract. Reg.*

54.

Inferior Courts ought not in Pleading
to shew a thing by implication,
but they must set it forth expressly.
And also Surplusage in an inferior
Court will make Error; for they must
keep their Forms precisely: For if they
should be suffered to break their Forms,
it would introduce all Barbarism and
Confusion, Idem 52.

The Jurisdiction of an inferior Court
must be set forth, and by what Authority
it is held, whether by Prescription
or Letters Patents. For every inferior
Court must be held one of these ways,
Idem 52.

A Court that holds Plea by virtue
of Letters Patents, ought to proceed
according to the course of the Common
Law. But Courts that are Courts
by custom, may proceed according to
their custom, so that it be not contrary
to Law, *Idem 54.*

One ought to speak against the Jurisdiction
of the Court by Pleading to it, and not by speaking in arrest of
Judgment, for then 'tis too late, *Idem 65.*

All

All Courts of Record were originally the Kings, *Idem* 57.

Consideration, To say *pro diversis Considerationibus* Causis & Considerationibus is not sufficient to raise an use, without Averment that Money was paid, *1 Cro. 154, 176.*

2 Co. 15.

Vide antea 106, 107.

Where the Conclusion of the Plea Conclusion of shall be, *Que est Eadem*, See *Latch 236, Pleas.* 475, 476.

Customs and Prescriptions, See *Touch. Customs and of Prec pag. 72.* Prescriptions.

Departure is when the Plaintiff doth Departure. plead in his Replication a Matter which is contrary to that which is admitted in his Declaration, this is a departure; *Pract. Reg. 79.* See before.

See *Touch. Prec. 200, 201, 202.*

If *A.* make a Bond to *B.* and deliver it to *C.* to the use of *B.* it is presently the Deed of *A.* But if *C.* offer it to *B.* and *B.* refuse it in the Country, and thereby the Bond loses its force, yet *A.* cannot plead *Non est factum* to it, *3 Co. 26.*

A Discontinuance of an Action or Suit Disagreement. is not a perfect Discontinuance, until it be entred on the Roll: But if this Discontinuance be to be pleaded, 'tis not necessary to plead the Entry of it, *Pract. Reg. 88.*

*When it may
be entred.*

Per Cur' After Issue the Plaintiff cannot discontinue, without assent of the Defendant, 1 Keb. 485. Pl. 23.

The Plaintiff cannot discontinue his Action after Demurrer joyned and entred, or after a General or Special Verdict found, or after a Writ of inquiry executed, without leave of the Court. See *Comp. Soll.* 334. 2 Keb.

355.

Divers Matters in one Action, and the Defendant pleads to all except one, and Issue tryed, and Judgment for the Plaintiff, and no Discontinuance, 11 Co. 6. b.

Discontinuance may be entred after Special Verdict, but not after a General; but then no Costs, 1 Cro. 575. But see more of this, *Pract. Reg.* 87, 88. nor after a Special Verdict found upon the Matter in Law, &c. *ut antea.*

Devise.

If a Devise of a Term be pleaded, he shall plead it, that he entred by the Assent of the Executors, 2 Co. 39.

When Land is claimed by Devise, 'tis of necessity in the Plea, to shew that it was *Socage tenure*, Cro. 667 Dyer 329.

Defence.

In all Cases before the Defendant Plead in Bar, he ought to defend the wrong supposed by the Plaintiff, *per Venit & defendit Vim & injur. quando,* &c.

&c. and if it be omitted tis no mistake
of the Clerk , but failing in substance,
Telv. 210. vide antea 56.

In Ejectment and ancient Demesne
pleaded, you ought not there to make a
full defence, See 5 Co. Aldens Case.

It seems that in a Writ of Right, the
Defendant ought to make a double de-
fence, (to wit) the Plaintiffs Right, and
to maintain his own Right : And
where two Defendants joyn in defence,
they ought not to sever in Pleading,
1 Cro. 331.

A Plea to the Jurisdiction ought to be, *Plea al Juris-*
Et pred. A. B. in propria persona sua venit dition.

& defendit vim & injur. Et dicit, &c.
For he ought not to make a full de-
fence by adding quando, &c. for that is
quando ubi & quomodo Cur' videbitur. Co.
Inst. 127.

In Pleading Assignment of Dower, *Dower.*
it is not necessary to say, *quod fuit per*
metas & bundas. 1 Cro. 101, 162. vide
postea. Bar al Dower.

In Pleading that the Bond is joynt, *Debt.*
he ought to say, that the other hath
Sealed, otherwise tis ill, 2 Co. 43. *Fon.*

304. 3 Cro. 549.

To a Debt upon Bond, 'tis no good *Conjunctim &*
Plea to say, that another was bound *divisim.*
in the said Bond, *conjunction & divi-*
sim with the Defendant, and that the
Plaintiff had recovered against him ,
and

Rules in Pleading.

and the Sheriff had permitted him to Escape.

Escape.

But tis otherwise, if the Escape be by the consent of the Plaintiff, 1 Cro. 75, 109, 240, 245, 551. 2 Cro. 142. 3 Cro. 850. Hob. 60. 1 Inst. 139.

Condition non
damnificatus.

Condition to discharge and save harmless, &c. tis no Plea to say *non damnificatus*, but he ought to shew how he discharged him, 1 Len. 71.

But on a Condition to save harmless from Bayling in such an Action, tis said *non damnificatus* is a good Plea, Mo. 857. 3 Cro. 165, 363, 634.

Doit monstr'
coment.

But if he pleads he had saved him harmless, and shewed not how, tis ill. See 2 Cro. 165, 363. *Vide postea*.

Condition.

Condition to pay 35*l.* at Michaelmas and 35*l.* at Lady-day; he pleads payment of the 70*l.* secundum form. Conditions, and good, though the condition implied several payments, 3 Cro. 256.

Deed.

Debt on Bond, Defendant pleads that *factum predict.* was sealed without date, and the Plaintiff put in a date after, *Et sic non est factum*, and on Demurrer adjudged against him: For by saying *factum pred.* he had confessed his Bond, but he should have pleaded *non est factum*, 3 Cro. 800.

Non est factum.

Executor,
Judgment.

In Debt against an Executor he pleads a Judgment in Bar, and because he

he did not plead *prout patet per Re-* *Prout patet cordum*, it was resolved to be ill, *2 Cro. per Recordum.*
266.

But if the Executor plead several Judgments, and that he had not Assets *ultra*, tis not good to say *sicut per Re-* *Sicut per Re-* *cordum pred.* *2 Cro. 625.* *cordum.*

Debt against Executor, they plead a *Executor, Judge-* Judgment against the Testator by *A. ment pleaded.* for 200*l.* and another by B. for 100*l.* and that they have not Assets, but to satisfie the 200*l.*

And the Plea was held double, hav- *Double Plea.* ing pleaded two Judgments and rely upon one, *9 E. 4. 12. a.*

Debt for 100*l.* Administrator pleads *Administrator,* Judgment of 200*l.* to another, *so plene judgments,* *Administravit*, and that he had not *pledaded.* Goods, *preterquam non attingen. ad* 200*l.* The Plaintiff Demurs generally because he shewed no certain sum, *Incertain ty.* whereto the goods amounted, according to, *9 Co. 109. b.*

Yet this is laid to be cured by General Demurrer, and held but Form, *murrer.* and oftner pleaded in the general, than to plead a particular sum, *Hob. 133.* *More versus Andrews. Trin. 16. Car. 2.* *B. R. vide Co. Entr. 445. a. 148. Pl. 27.* *152. a. 269. a. 617. b.*

In Debt against Executor on Bond, *Executor pleads:* Defendant pleads six several Judg- *six Judgments.* ments, and that he had not Assets *ultra* to

Rules in Pleading.

Two found by Fraud.

to satisfie them; Plaintiff replies, that they were obtained by Fraud and Covin, and the Jury find that two of them were by Fraud, &c. and Judgment for the Plaintiff, 1 Bro. 49.

Executor pleads Statute, how it must be pleaded.

Executor pleads Statute and Judg-
ment against his Testator, and that he
had not Assets *ultra*; in Pleading there-
of he ought to say, *quod per scriptum
obligatorium secundum formam Statut. con-
cessit, &c.* otherwise tis ill, and that it
was *pro vero & justo debito.* 2. And. 130.
1 Cro. 209. 362. 2 Cro. 8. 102.

Executor pleads a Recognizance to the King.

*What he ought to shew in plead-
ing.*

In an Action brought against Execu-
tor, if he plead a Recognizance to the
King, he ought to shew that the *Solven-
dum* was to his Heirs or Executors, o-
therwise tis no more than a Bond;
And he ought also to shew that it was
by Record, and the Record in certain,
otherwise the Plea may be ill, for the
King shall not have preference of Debts
which are not of Record. 1 And. 129.
Went. 190, 191, 192. Mo. 193.

*Note,
Wager of Law.*

Note, A man may wage his Law for
Debt on a simple Contract, although
the Debt is forfeited to the King, by
Attainer of the Creditor, 4 Co. 95.

*Condition to do several Things, generally plead-
ed and Demur-
rer.*

Debt on a Bond conditioned to do
several things, Defendant pleads per-
formance Generally, and Demurrer;
adjudged he should have answered to
all the particulars expressed in the
Action,

Action: But otherwise where tis to perform Covenants. *Wimbledon against Helderup. Trin. 22 Car. B. R. Rot. 704. Vide ante. p. 108, 165, 166.*

Debt upon Bond; 'tis no Plea, That *Statute Staple* he had accepted another Bond in satisfaction of the said Bond, or that he *pleaded in satisfaction of a Bond.* had accepted a Statute Staple, or that he had enfeoffed him, &c. For a Statute Staple is but an Obligation Record-*One Obligation* ed, and one Obligation cannot drown *cannot drown another.* another, although they be both for one Debt, and the Obligee may choose upon whether he will bring his Action, 6 Co. 44. 1 Cro. 85. 193. 2 Cro. 579. 3 Cro. 716. Mo. 872. 1 Inst. 212. con. Hob. 68. 1 Rol. 470.

Condition, That the Obligor shall *Notice before warrant and save harmless on Request,* *Suit, on a Bond, to save harmless on Request.* the Obligee ought to give Notice, and require the Obligor to save harmless before Suit, otherwise the Condition is not broken, Mo 189.

Debt upon Bond with Condition, *Condition to* That if the Plaintiff and his Assigns *enjoy Lands,* should enjoy such and such Land by *evaded.* virtue of such a Demise; that then to be void. The Defendant pleads, That after the Bond to such a day, the Plaintiff had enjoyed the Land; and good, 1 Cro. 195.

Arbitrament,
Plea Nullum
fecer' arbitrium. In Arbitrament Def. pleads, *Nullum fecer' arbitrium.* Plaintiff replies, *Quod fecer',* and shews the Award *verbatim.* The Defendant may say, *Non est factum Arbitrator', Yelv. 153. 2 Cro. 220.*

Pleads a Co-
ovenant, That
he should de-
tain the Rent. Bar in Debt for Rent, that the Lessor Covenanted, That he should detain the Rent, if he was disturb'd for Homage, and shews how he was disturb'd, 1 Cro. 137.

Pleads, Retinet
juxta agree-
ment. *Quoad partem nil debet. Quoad resid'*
retinet erga Reparaç' juxta Agreement. Co. 17.

Scire facias
against Exe-
cutors.

How he must
plead.

If a *Scire facias* be brought against an Executor, to shew Cause why he should not pay a Debt unto the Plaintiff, recovered against the Testator; the Executor cannot plead fully Administred; but he must plead, That no Goods of the Testators are come to his hands, whereby he might discharge the Debt: For he may have fully Administred, and yet be liable in Law to pay the Debt, *Pract. Reg.*

'Tis a good Plea for an Heir to say, That the Executor, or Administrator, have Goods sufficient, 2 *Inst. 442.*

Many are the Pleas and Bars in Debt upon Bonds, and otherwise, for which see *Survey of the Law*, Tit: *Debt*; *Touchstone of Precedents*; and *Townsend's Tables*, &c.

In pleading a Deed, you cannot say *Eshoppe*.
it was made before it bears date, *Perk.*

31.12 H.6.1. 2 Co. 4. But the Jury may
find it.

If a Deed be pleaded generally without *Deed pleaded*
any Exception, and upon *Oyer* it is *without Exception*.
shewn to be with an Exception; the
Defendant may plead *Non est factum*
generally, **1 Cro. 506.** **3 Cro. 726.**

A Deed made to two, to pay Mony *Mony given*
to one of them; and he to whom the *to two, one dies*
Mony is due, dies; the Survivor (and *how the Execu-*
not his Executor) shall have the Action, *tors shall sue.*
1 Bulst. 26. Telv. 177.

If two are mentioned to be parties to
one Deed, and one of them only Seals
it; In Pleading 'tis enough to say, That
he that hath Sealed, *per quoddam scriptum suum*, without mentioning the other
who did not Seal; and so in a Feoffment, where one of the Feoffees
dies as before, **Co. Entr. 120, 121.** **1 Cro. 506.** **Dyer 227.**

When two are named Grantors in *Two Grantors;*
one Deed of Land, and one of them *one has the*
hath the Title to the Land; in pleading you must say, That he that had
the Title did grant, without mentioning the other, **1 Inst. 45.** **6 Co. 14. Mo.**
72. 1 Cro. 406.

And so it is, when a Surrender is *surrender to*
made to two, and one of them only *two; Rever-*
had the Reversion. *sion in one.*

Quod

Counts on Indenture, and shews not between what parties.

Quod per quandam Indenturam concessit, and does not shew betweeen what parties the Deed was made; and yet good, *Pal. 173.*

If the Seal of a Deed be broken in Court; the Court will Inrol it for the benefit of the party, after this manner, *viz.*

Seal broken in Court, and Deed Inroll'd.

Memorand', Quod Sigillum cuiusdam Scripti indentat' cuius Tenor sequitur in hæc verba, Hæc Indentur', &c. Jur' pred. in Evidenc' dat' & ostens. & eis (int' al' scripta) pro Veredicto suo pred' dicend. considerand. deliberat. per eosdem Justic' ex infortunio & contra voluntat' suam abstract' fuit, &c. as the Case shall require, 2 Inst. 676. Hil. 1 Eliz. ro. 1166, & 35 El. ro. 1420.

Deeds to be produced in Court.

If one plead a Deed, he must produce it in Court: But one may give a Deed in Evidence, although he cannot produce it, if he can make it out by Proofs, that there was such a Deed; and so he may do of a Record, *Pract. Reg. 239.*

Fraudulent Deed.

Fraudulent Deed is good against the party, his Executors and Administrators, and is only void against Creditors; and in Debt against Executors, for not delivery of Goods according to Deed of Bargain and Sale; the Defendant cannot plead, That the Deed

Deed was made to defraud Creditors,
Telv. 196. 2 Cro. 260.

If a Deed be Inrolled by the Statute, *Enrolment how to be pleaded.* and the Inrolment of that Deed is to be pleaded; it must be pleaded precisely, that the Plea may be certain, *Pract.*

Reg. 144.

Escape and Rescue is a Plea for the Sheriff, to an Action brought on a mean Process for Escape; That the Prisoner was Rescued from the Defendant before he came to the Prison, &c. 2 Cro. 419, 486. 1 Rol. 99, 389, 807. Mo. 852. con. 3 Cro. 868. *Jones* 201.

If the Prisoner be taken on Fresh-suit and suit, in pleading the Reprisal ought to be alledged in the same County where the Action is brought; otherwise the Plea is ill. 3 Co. 52.

A Recital in an Obligation is an E-stopple by stoppel, against which he that made the Obligation shall not be permitted to plead any thing to the contrary, upon an Action brought against him upon this Obligation: For that were to contradict his own Act and Deed, *Pract.*

Reg. 125.

Where one hath liberty to confess and avoid the Matter, which the Plaintiff doth set forth in his Declaration; there he cannot be Estopped to plead such Matter for his defence, 125.

Rules in Pleading

*Estates, how
to be pleaded.*

In pleading Estates, 'tis not necessary to make mention of them that are determined; as if a Feoffment be made to Three, it may be pleaded to be made to the Survivors, without mentioning him that is dead, 1 Cro. 506.

*How to plead
Feoffment to
Uses.*

In pleading Feoffment to *Uses*, must say, *Virtue cuius intravit & seisi' fuit in Dominico suo ut de Feodo.* 2 Bulstr. 32.

If it be on Condition, *in Dominico suo ut de Feodo sub Conditione supradict'*.
1 Co. 142. b.

See after *verb. Deed.*

*General Estates
and particular
Estates, how
to be pleaded.*

In pleading General Estates in Fee, they may be generally alledged; but the commencement of an Estate Tail, and other particular Estates ought to be shewn, unless it be inducement to the Matter.

*Averment of
Life.*

And the Life of Tenant in Tail, and Tenant for Life, ought to be alledged,
1 Cro. 571. 2 Cro. 52. 103. 3 Cro. 18.
Plow. 148.

*Excommunica-
tion, how to be
pleaded.*

In pleading thereof you ought to shew the day of the Excommunication, especially if it be after the last Continuance, and must aver that the parties are the same; yet 'tis thought that [prædict'] helps it, 1 Inst. 303. Plow. 33. b.

When

When Excommunication is pleaded, *Letters Testimonial and Certificate, how to be made and directed,* you ought to shew the Letters Testimonial, that the party is Excommunicated, which ought to be certified by the Bishop ; and if certified by the Commissary or Official, is ill. But the Chancellor of an University may certifie Excommunication ; and the direction shall be, *Universis Sancte Matris Ecclesiae filiis.* 1 Inst. 131. a. 8 Co. 68. 1 Rol. 183.

So may the Vicar General, when the Bishop is in *remotis agend*, and the Warden in the Vacancy, F. N. B. 62. 8 Co. 69. 1 Inst. 134.

In the Certificate, the Cause for which he is Excommunicated ought to be shewn, otherwise 'tis ill ; and the Bishop ought to certifie, that it was in his own Court, and not in another ; or that he has found Sentence given by another Bishop. But he may certifie it to be made by his Commissary or Official, 8 Co. 68. 1 Inst. 131. a. 1 Rol. 434, 884.

In an Action the Defendant pleaded, *Defendant pleads Excommunicated, Et pet' quod Loquela remaneat sine mengement. die, &c.*

Plaintiff replies, That he had appealed to the Sentence, *Et pet' quod pred. hadAppealed. def. respondeat, &c.*

Rules in Pleading

And the Replication ill ; for it does not maintain his Action, 3 Bul. 72. Rol. 226. Rast. 320. 20 H. 6. 25.

*How the Entry
shall be upon
the Allowance
of this Plea.*

Qui tam, &c.

When such a Plea is allowed, the Entry is , *Quod Loquela remaneat sine die quousque, &c.* Co. Lit. Sect. 201. 8 Co. 69.

Excommunication is no Plea in an Action brought by *Qui tam, &c.* 12 Co. 61.

*False Latin
words in Pleas.*

*How to be con-
strued.*

When a thing is expressed in Latin with an *Anglice*, if the Latin word have no such signification as 'tis Englished, 'tis not good ; but if it have no perfect signification , nor elegant, as it might be , yet by Englishing of it, by which the meaning of the Plaintiff appears to the Court, the Plaintiff shall recover , and the Jury shall be intended to give Damage, according to the Declaration, in Latin.

But when there is a proper Latin word to express a thing ; there, if the Plaintiff declare by another bad word, as *Hama* for a *Crow of Iron*, it is ill, 10 Co. Osborn's Case. Yelv. 68, 95, 194. See Co.8. Blackmore's Case. *Vide antea.*

*The Statute
extends only
to Mistakes of
the Clerk.*

See also more of these words, and what are amendable after Verdict or Error, by Stat. 8 H.c.a. 12. or otherwise in *Pract. Reg. Tit. Words*, and *Amendment*; in *Touchstone of Precedents*, Tit. *Amendment.*

When

When a Fine is pleaded in Bar, if the *Fine pleaded,*
other reply, *Partes Finis nihil habuer*, *Repl' partes*
he ought to conclude his Plea to the *Finis nihil*
Country without any further Replica- *habuer*, *how*
tion, 2 Inst. 523. Dyer 290, 291. *the Plea ought*
to conclude.

That Letters of Administration were *Fraud in re-*
revoked by Fraud and Covin, and Issue *voking Letters*
thereupon, *Yelv. 219. 1 Bul. 187.* *of Administra-*

Fraudulent Deeds, *vide ante* Deed, *125, 176.*

It seems, that the defect of a Tra-*Defect of Tra-*
averse pleaded is only Form, and if the *verse.*
default thereof is not shewn by Demur-
rer, it is aided by the Statute, *1 Cro.*
324. 1 Len. 44.

If Joyn tenancy be pleaded by the *Joyn tenancy*
Defendant *ex parte Quer'*, 'tis not ne-*pleaded, and*
cessary to shew how; but when 'tis *how*.
pleaded *ex parte Def.* he ought to shew
how particularly, *2 Cro. 590.*

And so of Tenant in Common, See
Rast. 353.

Trespass against *Baron* and *Feme*, for *Issue by Baron*
a Tort by the Feme dum sola: The Plea *and Feme to an*
was, *Quod ipsi non sunt inde Culp'*, and *Action, for a*
adjudged ill; for it should have been, *Tort done by*
Quod ipsa non est inde Culp', and a Re-*the Feme,*
pleader awarded, *1 Bro. 6. 2 Cro. 6. 288.* *Dum sola.*

2 Rol. 62. 3 Cro. 883.

Vide postea.

*Jeofails and
Original.*

Original is aided by the Statutes; but a bad Original is not, nor Variance between the Name in the Original and Process, *Yelv. 109. 2 Cro. 185.*

See the Statutes, & *vide aneta pag.*

123.

*Teste of
Venire.*

If the *Teste of a Venire facias* be before the Issue joyned, 'tis helped by the Statute, *1 Cro. 90. Mo. 402.*

Defect of Averment is also aided after Verdict, *2 Cro. 44.*

*Justification in
Transitory Ac-
tion.*

Where the Action concerns a Transitory thing, If the Defendant do justify the taking or doing in one place, that is a Justification in all places.

*In Local Ac-
tion.*

But if the Action concerns a Local thing, a Justification in one place is not a Justification in another place, *Pract. Reg. 184.*

*Rules of Jus-
tification.*

Evidence.

By the Common Law, if the Defendant hath Cause of Justification or Excuse, then cannot he plead *Not-Guilty*; for then upon the Evidence it, shall be found against him, for that he confesseth the Battery, and upon that Issue cannot justify it; but he must plead the Special Matter, and confess and justify the Battery. See *Co. Lit. 283.a.*

See also the *Abridg. of Co. Lit. 311.*

If

If in Battery the Defendant may justify the same to be done of the Plaintiffs own Assault, he must plead it specially, and must not plead the General Issue; and so of the like.

In Trespass of breaking his Close, upon Not-Guilty he cannot give in Evidence, That the Beasts came through the Plaintiffs Hedge, which he ought to keep, &c. nor upon the General Issue, justify by reason of a Rent-Charge, Common, &c. 25 H. 8. Br.

In Detinue, the Defendant pleaded Non detinet; he cannot give in Evidence, That the Goods were pawn'd to him, and that it is not paid; but must plead it. Yet he may give in Evidence, a Gift from the Plaintiff; for that proveth, he detaineth not the Plaintiffs Goods, 22 H. 6. 33. 20 El. Dyer 276.

2 M. Dyer 212.

Two Obligors, and one retains the Attorney, a good Justification, Dyer 361.

If two Men be bound in one Bond joynly, and the one is sued alone, he may plead Matter in Abatement of the Writ, but he cannot plead Non est factum; for it is his Deed, though it be not his sole Deed, 5 Co. 119. See Co. Lit. 283.

Whosoever a Man doth any thing by force of a Warrant, or Authority, he must plead it.

Son Assault
demesne can-
not be given
in Evidence
in General Issue.

Nor, That the
Plaintiff ought
to repair the
Hedges, &c.

Nor that the
Goods were
pawned in
Detinue.

Upon Non Detinet a Gift
may be given
in Evidence.

Two bound
joynly, and one
sued, may plead
in Abatement
factum.

Authority must
be pleaded.

But all that hath been said must be under two Cautions.

Where a man may plead the General Issue, and give the Special Matter in Evidence.

1. That whensoever a Man cannot have advantage of the Special Matter by way of Pleading, there he shall take advantage of it in the Evidence. For Example; The Rule of Law is, That a man cannot justifie in the Killing or Death of a Man, and therefore he shall be received to give the Special Matter in Evidence, as that it was *Se defendendo, &c.*

So many Officers, as Justices, Mayors, Bayliffs, &c. for what concerns the Execution of their Office.

2. That in any Action upon the Case, Trespass, Battery or false Imprisonment against any Justice of Peace, Mayor, or Bayliff of City, &c. in any his Majesties Courts of *Westminster*, or elsewhere, concerning any thing by any of them done, by reason of any of their Offices aforesaid, and all other in their aid and assistance, or by their Commandment, &c. they may plead the General Issue, and give the Special Matter for their Excuse or Justification in Evidence, 7 *Jac. ca. 5. 23 H. 8. c. 5.*

Trespass may be laid either before or after it was done, so it be before the Action brought.

If the Trespass were done, the 4th of *May*, and the Plaintiff alledgedeth the same to be done the 5th of *May*, or the 1st of *May*, when no Trespass was done, yet if upon the Evidence, it falleth out that the Trespass was done before the Action brought,

brought, it sufficeth, 19 H.6.47.5 E.4.5.
21 E. 4. 66.

And *Littleton* saith, That the Jury may find the Defendant Guilty at another day than the Plaintiff supposeth,
Co. Lit. 283.

In Trespass for killing a Dog, the Defendant may justifie that the Plaintiff hunted with him in the Defendants ^{Defendant ju-}
Warren, *per quod* he killed the Dog, ^{stifies the kil-}
^{ling a Dog, for} ^{Hunting in his}
^{Warren.}
2 Cro. 45.

But a man cannot justifie the cutting of Nets and Oars, for that the Defendants endeavoured to Row on the Water in the several Fishing of the Plaintiff, and to take the Fish with their Nets, and that he cut the Oars and Nets for the safeguard of his Fish; yet he may take them Damage-feasant, &c.
1 Cro, 228. 3 Bro. 307.

If the Plaintiff do plead, That the Defendant became bound unto him *per that the Obligationem suam*; it shall be intended, That this Obligation was sealed and delivered to the Plaintiff, otherwise it could be no Obligation, *Pract. Reg.* 194.

The intent of the Parties shall not be imply'd against the direct Rules of the Law, *Idem.* ^{How the intent of the parties must be implied}

A thing which is impossible in Law, is all one with a thing which is impossible in Nature, *Idem.* ^{Impossibility in Law and Nature.}

It

Innuendo; its Office.

It is the Office of an *Innuendo*, to Mark out the person that was named before; but it cannot make a person certain, who was not certain before; it cannot alter the Matter in the sense of Words, 4 Co. 17. b.

Judgments, how to be Entred upon the Plaintiff's Demur to an ill Plea in Bar

If the Defendant plead an ill Plea in Bar, and the Plaintiff demurs upon it, and the Court gives Judgment for the Plaintiff: Judgment shall be entred upon the Bar, and not upon *Nil dicit. Yelv.* 38. 2 Cro. 13. 3 Cro. 754.

Limitation of Actions, when a thing is to be done upon Request.

When a thing is to be done upon Request, if the Plaintiff brings an Action within the time limited by the Statute, after the Request, 'tis well enough, and he shall not be barr'd by the Statute of Limitations, altho' the Promise to do it was beyond the time limited by the Law before the Action brought, 1 Cro. 139. *Hutt.* 106.

When it appears by the Count, to be out of the time. When it appears upon the Evidence, The Statute is in the Negative.

If it appear by the Count, That the Action is not brought within the time limited, Judgment shall be against the Plaintiff; and if it be alledged within the time, and upon the Evidence it appear to be beyond the time, the Action lies not; because the Statute is in the Negative, that he shall not maintain an Action, 1 Cro. 115, 160, 163.

Trover

Trover is within the Statute of Li- *How the Acti-*
 mitations; and if the Defendant remain *on may be*
 beyond Sea, it seems that the Plaintiff is *limited in*
 not barred by the Statute: And if a *Trover.*
 man take Goods and convert them,
 and after the time of Limitation get
 them again and convert them, the
 Owner may maintain an Action upon
 the last Conversion, 1 Cro. 245, 334.
Jan. 252.

The Statute of Limitation is no bar *Debt for Tithes*
 in an Action of Debt for Tithes, 1 Cro. *not limited.*

513.

And Specialties, Bonds, Bills, Inden- *Nor Specialties.*
 tures, &c. are not limited, but you may
 sue them when you will, *Compleat Sol-*
lidor 172.

In pleading, 'tis sufficient to say, *Mortgage;*
Quod Clavum predict', predicto tempore con- *how to be*
fection' script' Obl' pred' pignoratum fuit pleaded.
pred' A. B. &c. without saying how it
 was Mortgaged, 3 Cro. 899.

None shall be compelled to shew a *Monstrans:*
 thing in pleading, which by common *None compelled*
 intendment they cannot have know- *to shew a thing*
ledge of, Pract. Reg. 201. *in Pleading*
which they

An * Assignee shall have an Action of *cannot have*
 Covenant, without shewing the Deed *knowledge of.*
 of Assignment, 3 Co. 63. 3 Cro. 373, * *Assignee need*
436. *not shew the*
Assignment.

Cestuy

*Cestuy que use
need not shew
his Deed.*

*Cestuy que use need not shew his Deed
in pleading, but he ought to shew, that
the Grant was to him by Deed, Dyer
277. 2 Cro. 217.*

*Defendant must
shew his Deed
upon pleading
performance to
a Bond, to per-
form Covenants*

Debt upon Bond to perform Covenants in an Indenture ; if the Defendant pleads performed, he ought to shew the Deed in Court ; otherwise the Plea is ill upon a General Demurrer, for it is Substance, Rol. 20.

*Bond not to
alien without
Licence in
Writing. Plea,
That he alien'd
by Licence, and
need not shew it.*

In Debt upon Bond, Conditioned not to alien Lands without Licence in Writing. Defendant pleads, That he aliened by Licence in Writing, without shewing the Writing in Court ; and good, 6 Co. 38. 2 Co. 102.

*In pleading
Grant of a Re-
version, must
shew 'twas by
Deed.*

In pleading the Grant of a Reversion, he ought to shew that 'twas by Deed, otherwise 'tis ill ; but if he alledges Attornment to the Grant, it shall be intended to have been by Deed, 1 Cro. 143. Dyer 174.

*Tenant in
Dower and
Elegit, &c.
shews no Deed
in Court.*

Tenant in Dower, by *Elegit*, and he that comes to a possession by the Act of the Law, shews not the Deed in Court, 10 Co. 94. 1 Cro. 209. 2 Cro. 70. 271.

*Modo & forma
what is put in
Issue thereby.*

Modo & forma do not put the Day nor Place in Issue ; but only the Matter and Substance of the Plea, 2 Rol. 713.

Where

Where a Traverse is with a *Modo & Traverse with forma, &c.* that will put the manner, as ^a *Modo & for-*
well as the Matter in Issue, where the ma.
 manner is material, as the Time, the
 Fact, and other Circumstances, when
 they are the effect of the Issue, *2 Rol. 708.*

Negative pregnans. In *Trespass* the *Negative preg-*
 Defendant justifies by Licence from the *nans.*
Plaintiffs Son. Plaintiff replies, *Quod non* *By the Plaintiff*
intravit per Licentiam suam, That is a
Negative pregnant; for he ought to tra-
 verse the Licence by it self, or the En-
 try by it self, *2 Cro. 87.*

A *Negative pregnant* is, when two *Traverse.*
 Matters are put in Issue in one Plea, and *by the Defen-*
 this makes the Plea to be naught; be-
 cause the Plaintiff cannot tell in which
 of these Matters to joyn Issue, for the
 uncertainty upon which of the Matters
 the Defendant doth insist upon, *Pract.*

Reg. 220.

Vide antea p. 94.

Quod non habetur aliquod tale Recordum, *Nul tiel Re-*
talis Inquisitionis post mor. pred. J. modo & cord; *Inquisi-*
forma, &c. *1 Cro. 104. Hut. 97.*

In an Action of Debt in the Common *Debt in the*
 Pleas, upon a Judgment in the Kings *Common Pleas*
 Bench; if the Defendant pleads *Nul tiel for Judgment*
Record, he shall have a *Certiorari* out of *in B. R. and*
 the Chancery, and by *Mittimus* the Re- *Nul tiel Re-*
 cord shall be sent into the Common *cord.*
 Pleas, *Dyer 32. b. 1 Cro. 297.*

*Record ought
to be pleaded
intire.*

A Record ought to be pleaded intire, that is, the whole Record, and not part of it with an (*int. alia*) in reference to the Record ; and so ought a special Verdict to find a Record ; for a Record cannot be taken by parcels, *Pract. Reg. 279.*

*A Record of
the same Court
pleaded.*

It hath been held, that if a Record in the same Court be pleaded, the other cannot reply *Nul tel Record*, but he may pray to see the Roll. *Quære.*

*Nolle prosequi
to some Issues
where divers
Issues are joy-
ned.*

Where there are divers Issues joyned between the Plaintiff and Defendant, and the Plaintiff enters upon the Roll a *Nolle prosequi, id est, Non vult ulterius pro- sequi*, that he will not proceed upon one or more of the Issues joyned, yet he may proceed to Tryal upon the rest of the Issues, *Pract. Reg. 206.*

*Trespass against
2 and several
Pleas, Verdict
for both, and
several Dam-
ages and Nolle
prosequi a-
gainst one.*

In Trespass against Two, who plead several Pleas, and at the Tryal both are found for the Plaintiff, and several Damages, the Plaintiff may enter a *Nolle prosequi* against one, and proceed against the other ; and so upon a Demurrer, or Issue and Demurrer, 2 *Len. 177. Mo. 624. 1 Cro. 239, 243. 2 Cro. 118, 349.* *Vide Hob. 70.*

*Non est factum
to a Sheriff's
Bond how to be
pleaded.*

If upon a Sheriffs Bond, &c. the Defendant pleads the Statute 23 H. 6. he ought to plead the special Matter and conclude, *Issint non est factum, &c.* for he cannot plead *Non est factum* generally, 7 *E. 4. 5.* Not

Not Guilty is a good Plea upon an *Non Cul' upon Assumpſit*, if the Plaintiff do not demur *an Assumpſit*. thereupon; and after a Verdict Judgment shall not be stayed, and the reason is because *Tort* and *Deceit* is alledged,

3 Cro. 470. Noy. 56.

And so in Action of Debt for not *Non Cul' in paying of Tithes upon the Statute, 2 E. Debt for Tithes*, *6. Non Cul'* is a good Issue because *Tort* is supposed: And so upon all Statutes, which prohibit the doing any thing upon a penalty, *2 Inst. 651. 2 Rol. 683.*

3 Cro. 621, 257.

When a clause of *Non Obstante* shall make the grant of the King good, when not, *4 Co. 34 Bozoums case.*

*Non Obstante,
how the same
shall be con-
ſtruēd in the*

Resolved, when the King by Common Law, cannot in any manner make a Grant, there a *Non Obstante* of the Common Law will not make the Grant good, against the reason of the Common Law, as a Grant of a Protection in an Affize or *Quare Impedit.*

But when the King may lawfully make a Grant, there a *Non Obstante* supplies; as the King having made a Lease for years, Grants the Land, *Non Obstante*, that it be in Lease for Life or years, &c. but the Common Law requires, that he be so instructed, that he be not deceived. See the Book at large.

I have here added an excellent Argument, made by a present Learned Lawyer, concerning the *Non Obstante* in the Kings Grant, wherein are also other notable things.

The Argument upon the Clause Non Obstante. Hill. 28 & 29 Car. 2. R. rot. Thomas Harris Senior and Thomas Harris Junior in Action *sur Cuse versus Scipio Stukely sur indebitat' Assumpfit pro 200 l. per denires receive a lour use:* Defendant pleads *Non Assumpfit*: Jury trove Spec' verd' wherein they find, that the King by his Letters Patents dated the 17 Aug. 12 Car. 2. did constitute John Holle and the Defendant Controllers of the Customs in the Port of Exeter and the adjacent parts, *Habend' tō Holle and Stukely quamdiu Nob' placuerint*, together with all Fees belonging to the said Office, that John Holle died within 7 years, That the Defendant Stukley, from the Death of Holle to the exhibiting of the present Bill, *viz. 28 Nov. 28.* in the Execution of that Office hath continued, and yet doth contine, and all that time hath received Fees and Profits belonging to that Office, in all amounting to 100 l.

That 1 May 27 Car' 2d. the King by his Letters Patents did grant to the Plaintiffs the said Office, *Habendum & exercend' per se vel eor' alt' vel per sufficien' Deputat' suum*, immediately from the making

making of the Grant ; if the Office be void ; if not, then when it shall next become void, for and during the Lives of the Plaintiffs, and the Survivor of them, together with all Fees thereunto belonging , and that the Grant shall be good *Non Obstante Stat. 17 R.2. 1 H. 4. 4 H. 4. 13 H. 4.* nothing to the question, *31 H. 6. 6 H. 8.* or any other Statute Matter or thing whatsoever to the contrary, *sed utrum super tota Materia the Defendant Assumpsit super se, &c.*

Here followeth Mr. Pollexfen's Argument.

In this Case :

1. Whether the Grant to the Plaintiffs of this Office, for their Lives and the longer liver of them , to be executed by them or their Deputy , be good in Law ?

2. If it should be, whether the Plaintiffs be thereby intituled against the Defendant , to maintain this Action of *Indebit' Assumpsit* against the Defendant ?

3. If he can, whether upon this Verdict the Plaintiff can have Judgment ?

I. That the Grant to the Plaintiffs is void, being contrary to the Stat. 14 R.2. Cap.10. That no Customer or Con-

O troler,

troler shall have Ships of his own, and that to eschew as well the damage of the King's Customs, as the loss of the Merchants repairing to the Port ; and that no Customer or Controller have any such Office for term of Life, but only as long as shall please the King, notwithstanding any Patent or Grant made to any to the contrary.

17 R. 2. Cap. 5. That no Controller shall have any Estate in his Office for Term of Life or Years, but that the said Office, shall remain in the Kings Hands under Government of the Treasurer for the time being ; and if any to the contrary, that they shall be void and of no Effect.

1 H. 4. 13. Recites the *Stat. 17. R. 2.* and confirms it.

31 H. 6. 5. confirms *17 R. 2.* and that this Office shall not be granted but by Warrant from the Treasurer sent into the Chancery.

That this Patent is contrary to all these Statutes is clear ; but then the Question is, whether the *Non Obstante* in the Patent , shall and may by Law dispense with these Positive and Affirmative Statutes, and make the Grant good notwithstanding.

*The Question
upon the Non
Obstante.*

Herein

Herein I desire to consider of the Case as it would have been, if all those Statutes had been mentioned in the Patent by express words, *Non Obstante* to every Statute.

And if so, yet I conceive this Patent had been void.

I do admit and agree, that wherefo-*The Resolution* ever a Statute is made, that doth pre-*of the question* scribe and direct a form for the King to act by, for the ease of the King, there what is thus proposed, being de- signed for the Kings benefit, the King *Statutes to be* by a *Non Obstante* of this Stat. can di-*dispensed*. spense with it.

Therefore Stat. 9 Ed. 2. directing the meeting of the Treasurer, Judges and Barons upon *Craftin Animar* for pricking Sheriffs may be dispensed with by a *Non Obstante*, for it takes not away the Kings power to make, but only directs a form, *Dy. 225. 1 Cr. 595.*

Stat. 31 H.6. That directs, that Controller of Customs shall not be granted, except there be a Warrant produced in Chancery for it, may be dispensed with as to that part of it, *Hob. 214. Hare and Leisure. Dyer*

304.

Also where Statutes are not positively and directly prohibitory, but only *sub modo* under a forfeiture of such a Penalty, there the King may dis-

pense by a *Non Obstante*. Case of Monopolies, 11 Rep. 88.

Statutes positive not to be dispensed.

But where a Statute is express and positive that such a thing shall not be done, and that Statute made for the publick good of the Kingdom, in which not only the King, but the People also have a concern, a *Non Obstante* cannot dispense with that Statute.

And of that nature is this Statute, 14 R. 2. Cap. 10. and the rest of the Statutes. First, It is not directing any form, or under any qualification.

1. But is direct, express and positive, that no Patent of this Office shall be granted for Life, and that if any Patent be so granted, it shall be void and of no effect.

2. That these Statutes are made for the publick good, wherein both King and People have advantage.

1. The Statute 14 R. 2. Cap. 10. expresses, that to eschew as well the damage of the King, as of the Merchant repairing to the Port, that Controllers shall not have Patents for Life.

Stat. 31 H. 6. Cap. 5. saith, that People have obtained Grants for Life, to the great prejudice of the King and his People.

2. Nature

2. Nature of the Office and reason of these Statutes : The ancient Officers of the Customs were Customer and Controller, and in them was the management of the Customs ; they of the one side gave accounts to the King of the Custom of this Duty , and therefore if they misbehave themselves the King was prejudiced and deceived.

Therefore 4 H. 4. ca. 20. they must be sworn upon Oath to give true account.

3 H. 6. 3. Not to conceal Customs duly entred and paid , under forfeiture of treble value.

11 H. 4. 2. Against their keeping Inns or Taverns.

These provide against the mischiefs by which the King was deceived. Other Statutes provide against the mischief that the Subject suffered by the Officer.

And the Stat. 14 R. 4. that the Officer shall not own or meddle with the Fraight of Ships, and that as well to avoid the mischief to the King as the Subject.

To the King , thereby to favour or connive at the Merchants that Fraighted their Ships, by permitting them to make Entries and Payments less than their duty.

To the Subject, by dispatching and discharging these his own Customers, and delaying or denying others that were not, whereby many advantages are lost.

Stat. 11 H. 6. 15. Enacts, that the Controller shall deliver the Merchant a Warrant under Seal, of the Merchandise shewed, without Fee and under a forfeiture.

And in truth much lyeth in the power of the Officer, wherein the Merchants are deeply concern'd; for he hath in his power not only to wrong the King, but also to exact upon and poll the Merchant, if he pleaseth.

He is an Officer according to his Constitution, wherein the Trade of the Kingdom is very much concern'd, as well in his Skill and fitness, as his Honesty and Integrity; and that is the reason there have been so many Statutes made concerning these Offices, that they should be at will. Then, if so be that these Offices be of so publick concern, and that the Subjects have any such interest or concern in them, then these Statutes cannot be dispensed with by *Non Obstante*.

Stat. 31 El. c. 6. Symony, That the person Symoniacally taking a Benefice, shall be a disabled person in Law, to enjoy the same.

Stat.

Stat. 6 E. 6. r6. That Offices granted for mony, contrary to that Statute, shall be void.

Hob. 75. The King against the Bishop of *Norwich*, that these Statutes cannot be dispensed with by a *Non Obstante*.

1 Inst. 120. That these Statutes cannot be dispensed with by a *Non Obstante*, as it may be if it were *sub modo* or under a penalty given to the King.

5 Rep. 15. b. *Sur le Stat.* 13. Eliz. 10. *pur faisant* Leales void, that are made contrary to those Statutes, faith, That the King being the Head of the Weal-publick, cannot be an Instrument to defeat the purview of an Act of Parliament made *pro bono publico*.

4 Inst. 135. Resolved by all the Judges that the Statute 13 R. 2. c. 3. and the other Statute restraining the Jurisdiction of the Court of Admiralty, being Statutes wherein the Subjects of the Realm have interest, cannot be dispensed with by a *Non Obstante*.

2 Roll. 179. That where a Statute concerns the benefit of a Subject, it cannot be dispensed with by a *Non Obstante*.

New Point.

Whether (Non
Obstante aliquo
alio Statuto)
will dispense a
Statute not ex-
preſly menti-
oned.

The Solution.

Notwithſtand-
ing hath not
the effect of a
Non Obstante.

2. By way of Admiffion, these Sta-
tutes may be dispensed with by a *Non
Obstante*, yet as this Case is, the first
Stat. of 14 R. 2. 10. being omitted and
not exprefly mentioned, whether the
general words *Non Obstante aliquo alio
Statuto*, it be dispensed with.

It is not enough that the Grant do
express the Kings intent to be contrary
to the Statute, for then there would be
no need of a *Non Obstante* at all in any
Case.

General words in the Kings Grant ,
as , *Notwithstanding any Law , Statute,
Act , Matter or thing to the contrary.*
(Notwithstanding) will not have the ef-
fect of a *Non Obstante*.

But that the King may not be decei-
ved in his Grant, but know with what
Statutes he doth dispense , there must
be express mention made of the Sta-
tute, and the *Non Obstante* be by express
name.

3 Cro. 515. Lord Darcy's Case, K. E.4.
Granted to the Dean and Chapter of
Pauls to be discharged of Purveyance.

33 H. 8. those Lands came to the
Crown, and were granted to the Lord
Darcy with all such Priviledges as the
Dean and Chapter of *Pauls* enjoyed,
Non Obstante aliquo Statuto in contrar':
Adjudged, that theſe words, *Aliquo Sta-
tuto*, ſhould not dispence with the Sta-
tute

tute 27 H. 8. c. 24. but the Statute ought to have been expressly mentioned: And in truth no man can undertake to have all Statues in his Head, and there will be many Surprises, if otherwise.

Dyer 352. *Non Obstante aliquo Statuto actu vel restrictione in contrarium edit' & provis.* intended to dispense with the Statute of *Pluralities*. But Adjudged *contr'*.

Then if these General Words will not do it, a Dispensation with one Statute is not a dispensation with another. *Non Obstante* to the Statute of *Confirmation* is not a *Non Obstante* to the first Statute.

3. Suppose all this against me, yet the Plaintiff cannot in this Case maintain this Action. Here is neither Contract nor Privity betwixt the Parties, but *Tort* and Wrong. He must bring an Assize against the Defendant, *J. Web's* Case, 8 Rep. 47. And that as well by the Common Law, as by the Sat. *West.* 2.c.25. And if not the whole, but parcel of the Profits, he shall have an Assize for them; *Comment upon that Stat.* 412. He might also bring an Action of the Case: Can the same Fact be Right and Wrong?

Case per le Steward del Manner a- Count de Sa-
gainst him that took upon him and *lop's* Case,
exercised the Office, and took the Rep. 68.
Profits;

Profits ; and thereby hindred and deprived him that had Right.

But how can an *Indebitar' Assumpsit* Jye, where Debt doth not ?

He was *Customer de Facto*, Answerable to the King for what he took ; but for the Fees due for the Execution, 'tis uncertain what Allowance he shall have.

If a Diffeisor of a Mannor receive the Rents of the Tenant, shall the Diffeisee have an Action of Debt ?

6 H. 4. 9. a. 2 Rol. Tit. Dett 597.
That if a man receive the Rents of my Tenants of his own Head , I cannot have Debt. (*Slade's Case*, 4 Co. 94. Contract Executory which implies Promise by Reputation.) How then can the Plaintiff maintain this Action against one that Intrudes, and of his own head receives Fees, that if the Plaintiff had been in the Office, it had been due to him ?

*Special Verdict
dependant.*

This of Fees is a worse Case than that of Rent: For an Officer hath no right to his Fees, but only by reason of Executing the Place ; he cannot demand them of those that ought to pay, unless he had Executed his Office: How then against a Stranger ?

*Brown and London, 23 Car. 2. B. R.
Indebit' for Bill de Exchange, Mountney
and Royden.*

4. If

4. If all this against me, Ne poet recover come cest Verdict est.

Quære the Judgment.

Novel Assignment. To Assign in one Novel Assignment in one Acre of Land in quodam Campo, without the Name of the Acre, or Buttels, is not a good Novel Assignment. *Dyer* 264. *2 Cro.* 594. *3 Cro.* 355. *Acres.* 492.

Vide antea p. 109.

Non-suit, see before, p. 64, 97, 115. *Non-suit.*

Outlawry. How and when it may be *Outlawry*, pleaded, *vide antea p. 158.*

How to conclude the Plea upon it, *vide ante p. ibid.*

See many good Causes of Error to Reverse Outlawries in *Touchst. of Prec.* 161. Tit. *Outlawries and Outlaws.*

Observe also *Utlary*, after.

And note, That the Court will not *Outlawry not to be reversed by Consent.* Reverse an Outlawry, although both the parties consent to it, except there be Error assigned in the Outlawry; for Matters of Record are not to be destroyed without sufficient Cause; and it doth also concern the King, as well as the parties, *Pract. Reg.* 224.

If one be bound unto *J. S.* in an *Obligation to one, the Sol-* Obligation of 20*l.* to be paid unto *J. D.* it is naught. For to *J. S.* it can-*vendum to another.* not be good, for the Obligor is not bound

bound to pay him the 20*l.* in which he is bound, the *Solvendum* being to *J. D.* And to *J.D.* it cannot be good; for if he pay him not the 20*l.* he cannot sue for it, the Obligor being not bound to him, *Idem 221.*

*Obligation,
Solvendum to
the Obligor.*

*False Latin
in Bonds.*

*Oyer, pleading
before it and
after it.*

*A Copy upon
Oyer prayed.*

Plaint defined.

But it is said to be a good Bond in Law, where the *Solvendum* is made to the Obligor instead of the Obligee, 1 *Cro. 77.* Therefore *Quære.*

Concerning False Latin in Obligations, see 2 *Cro. 146, 190, 309.* 3 *Cro. 896.* *Yelv. 95, 105, 225.*

If one be sued upon an Obligation, he may pray *Oyer* of the Obligation, and is not bound to plead before *Oyer*; yet he may plead without *Oyer*, if he please. See before p. 56.

But if he do plead without *Oyer*, he cannot after his pleading waive his Plea, and demand *Oyer* of it; and by the Practice of the Court he is to have a Copy (as well as Sight and Reading) upon *Oyer* prayed, *Pract. Reg. 225.*

The *Plaint* is the Causè which the Plaintiff doth express in the Writ, for which he doth complain to the King, and for remedy thereof desires the King's Writ; and in the Declaration the Plaintiff doth more at large express the same Matter unto the Court where he brings his Action, *Pract. Regist. 226.*

In

In an Action of Debt upon a Record, 'tis not necessary to recite the whole Record; but only *Breviter, Quod pleaded.* *Process upon Recovery*
recuperasset, &c. per quod Actio accreuit; and so in all Cases where the Record is only Conveyance to the Action, *Inst. 303. 2 Cro. 567. Plow. 65. Telv. 16.*

In pleading *Process* in an Inferior Court, you ought to shew the Authority by which the Court is held, and the Jurisdiction thereof by Patent or Prescription, otherwise it is ill, and the Process void, *8 Co. 133. 1 Cro. 46. 2 Cro. 532.*

In pleading the Process of a Court, not of Record, you must shew the whole of Record, at large; for the whole is traversable, and if any part be defective, the Officer may not justify, *2 Co. 24.*

After the Defendant hath filed Bail in this Court, *Procedendo* ought not to be granted, much less after Issue is joyn'd in the Cause, *Pract. Reg. 259. Pasch. 23 Car. B. R.*

A Prohibition doth lye in all Causes where a *Habeas Corpus* doth lye, and as well concerning a man's Estate, as his Person, *Pract. Reg. 228.*

See many Special Causes of Prohibition in *Pract. Reg. 227, 228, 229, 230, 231, & 305.*

And

*To the Court
of Admiralty.*

*To an Inferior
Court.*

And note it is there said, That the Defendant in the Court of Admiralty may have a Prohibition to that Court after he hath pleaded there, although he cannot have it to an Inferior Court after he hath pleaded; and the Reason is, because the Court of Admiralty doth draw the Matter *ad aliud examen*, to try it by the Civil Law; but the Inferior Court doth proceed according to the Common Law, and so doth not draw the Matter in question *ad aliud Examen*, *Pract. Reg. 230.*

*Protestando
advantageous.*

Protestando sometimes is advantagious, although the Plea be found against him that took the Protestation. *Inst.*

I 26. a.

Vide antea p. 70.

*General Par-
don how to be
pleaded.*

He that will take the benefit of a General Pardon, ought to plead the Statute by which the General Pardon was granted, that the Court may judge whether his Offence be pardoned, or not, *Pract. Reg. 247.*

A Pardon for Treason cannot be pleaded until the Prisoner be charged with the Indictment for the Offence committed, *Idem 252.*

*Pardon for
Treason, how
to be pleaded.*

This Court will not give the penalty of an Obligation to the Obligee, which was only made to perform the Covenants of an Indenture: For the Obligee may be but little damaged by the

the Breach, *Idem* 247. 21 *Car. in B.*

Reg.

The Plaintiff's Pledges, that he shall prosecute his Suit, may be entred at any time pending the Suit; for it is now but a formal thing, *Idem* 252.

But it is said, That in Action brought by an Attory of the Common Pleas by Bill, there ought to be Pledges of Prosecuting at the end of his Bill, otherwise 'tis Error, and Judgment shall be reversed after Verdict for default thereof: For it is thought to be substance by *Dy. 288. H ut. 92,* and *1 Cro. 92.* But Quære how, for they are but the Common Pledges.

If an Infant be Plaintiff, he need find No Pledges by no Pledges on his Count, *1 Cro. 161. Infant.*

But in Replevin, if Pledges be not found upon the Plaintiff, 'tis said to be plevin. Error, *Idem 594.*

Plenarity for six Months is no Bar against the King; yet 'tis said to be so against the Queen, and against any Common Person, *2 Inst. 138. 22 H. 6. 27. 38 Ed. 3. 4.* And Institution is there said to be a good Plenarity.

See more of this in *Survey of the Law,* and *Touchst. of Prec. Tit. Quare Impedit.*

Payment

*Payment of
Mony before
the Day.*

*Payment with-
out Deed.*

*Tender before
Action and
Refusal.*

*And Mony
brought into
Court.*

*Foul Practice,
one Attorney
promising ano-
ther to stay
for a Plea, but
yet enters
Judgment.*

Payment of Mony before the Day of payment appointed , is in Law a payment at the Day ; for 'tis no prejudice to pay Mony before time, *Pract. Reg. p. 258.*

In an Action of Debt brought for Rent due upon an Indenture of demise of Lands , the Defendant may plead payment without Deed, and 'tis a good Plea in Bar ; because the Lessee cannot compel the Lessor to make him any Discharge by Deed or Writing upon payment of the Rent, *Idem 258.*

Where the Defendant did tender unto the Plaintiff the Monies (for which the Action is afterwards brought against him) before the Action was brought , and the Plaintiff refuseth them , and notwithstanding sues the Defendant ; the Court will (upon motion and proof of this Tender) order the Mony to be brought into Court, and will stay the Plaintiffs proceedings. For the Court will not encourage Men to be Vexatious, *Idem 249. Trin. 23 Car. B. R. Vide postea.*

Vide antea Uncore prij. p. 92.

If the Attorney for the Plaintiff do tell the Defendants Attorney , That he is content to stay for a Plea till such a time, and yet doth in the mean time enter Judgment for want of a Plea ; this is not fair Practice : But if this

be made appear to the Court, the Court
will vacate the Judgment, and force
him to accept of a Plea, *Pract. Reg.*
260.

A Priviledged person shall not be allowed his Priviledge upon a Motion to the Court; but he must appear and plead his Priviledge; and upon his Pleading he shall be allowed, *Idem p.*

263.

The Prayer of Priviledge is not properly a Plea, *Idem 265.*

One cannot prescribe to have two several Ways by one joyn Prescryption; but he must make several Prescriptions for them, *Idem 265.*

In pleading, a man ought to shew from what place, and to what place the Way is; for it must be in a place certain, and what manner of Way it is, Foot, or Horse, or Cart-Way, otherwise 'tis incertain and ill, *1 Inst. 56.*
Telv. 164.

A thing which is proved to have been and continued for so long time as any one living can remember, shall be presumed to have been beyond the Memory of Man, and will be accounted a good Prescryption, because the contrary cannot be proved, *Pract. Reg.*
268.

Possession pleaded, and shews not how:

Possession. In Trespass and Assault, the Defendant says, he was possessed of a House (and shews not how). *Et motu manus imposuit ad extraponendam Quemque Domum, &c.* This is a good Justification; Because the possession is an inducement to the Plea, and he need not shew, how, or for what he is then possess,

I Cro. 138.

Protection, &c. pleaded, and where to be allowed.

A Protection directed to the Sheriff, That he shall not Arrest a man, is said to be Illegal and void; and such a Protection hath been disallowed, and the Sheriff amerced for staying upon such Protection, 2 Inst. 56. Raft. 335. Vide Fitzh. N. B. 28, 29, 30. Vide infra.

In every Action, or Plea real or mixt, against Two, &c. a Protection cast for the one, doth put the Plea without Day for all, as in Debt, &c. 9 E. 3. Protect. 80, 81.

A Protection cannot be cast, but when the party hath a Day in Court; and when, if he made default, it should save his default, &c. 46 H. 22.

In Appeals of Felony and Mayhem, Protections are not allowed by Common Law; so it is where the King is Sole party; and Protections in personal Actions are expressly ousted by Acts of Parliament, Bract. lib. 5. 139, &c.

In

In a Writ of Dower *Unde nihil habet*,
in a *Quare Impedit* or *Affize* of *Darrein Presentment*, in *Aff. of Novel Disseisin*,
in a *Qu' non admisit*, &c. no Protection
is allowable.

By Act of Parliament, 'tis not allow-
able in Attaint, nor in an Action against
a Goaler for an Escape, nor in Pleas
of Trespass, or other Contract made,
&c. after the Date of the same Protec-
tion, 23 H. 8. ca. 3. 7 H. 4. 4. 13 R. 2.
16.

Note, In Judicial Writs which are in
nature of Actions, where a party hath
day to appear, there a Protection doth
lye, as in Writs of *Scire facias* upon Re-
coveries, Fines, Judgments, &c. so it is
in a *Quid juris clamat*, &c. But in Writs
of Execution, as *Habere fac'*, *Seifinam*,
Elegit, Execution upon a Statute *Cap'*
ad Satisfac', *Fieri fac'*; here no Protec-
tion can be cast for the Defendant,
13 E. 3. *Protectt.* 72.

No Writ of Protection can be al-
lowed, unless it be under the Great
Seal, and it is directed generally, 2 Co.
fo. 17 *Lane's Case*, 8 Co. fo. 68. *Trallop's*
Case, 35 H. 6. 2.

The Courts of Justice are to allow
or disallow of the Protection, &c. (be
the Courts of Record, or not) and
not the Sheriff, or any other Officer,
43 E. 3. *Protectt.* 96,

Rules in Pleading

Albeit Queen Elizabeth maintained many Wars, she granted few or no Protections; and her Reason was, That *He was no fit Subject to be employed in her Service, that was subject to other mens Actions, lest she might be thought to delay Justice,* Co. Lit. 131. b.

See the Abridgment 135, 136, 137, 138, 139.

Que est eadem, Where Defendant justifies by Warrant.

Where not necessary in the Justification.

Recoveries, how to be pleaded.

Record.

Reference:

Trespass in London; Defendant Justifies by a Warrant in the County of Norfolk, *Que est eadem Transgr', &c.* and Traverseth, That he is Guilty in London, *Vel alibi extra Com' Norf.* and good, 2 Cro. 372.

If the Defendant in Trespass Justifie the same day and place, 'tis not necessary to say, *Que est eadem, &c.* 1 Bulst. 138. Kelw. 27, 29. 21 H. 7. 39.

Where the Conclusion shall be, *Que est eadem Transgr', &c.* see Latch. 236, 475, 476. Vide Kitcbin 236. b.

Recoveries: See how to plead Recoveries. Plow. 65. b.

Vide antea p. 223, 224.

A Record ought to be pleaded entire, &c. vide antea p. 54, 190.

Reference, vide antea p. 156, 159.

Plea,

Plea, That the Plaintiff *22 Febr. 10 Release.*

Car. released all Actions, &c. The Plaintiff demands *Oyer of Release*, and it was of all Actions before *14 Jan.* and so 'twas no Release to the Day of the Release, *1 Cro. 427.*

If the Sheriff in return of a Rescue *Rescue, how to mention no place where the Rescue was be Returned by made, 'tis ill; yet if it be not Infra the Sheriff. Ballivam meam*, if it appears to be within the County where the Proces was awarded, 'tis good, *Yelv. 51.*

Repleader after a Verdict and Judgment *Repleader, where to be removed by Error into the Kings Bench; if the Issue is not well joyned, there shall be no Repleader, but the Judgment shall be reversed, 1 Cro. 494.*

Vide antea p. 124, 135.

A *Retraxit* is a Bar of all other Actions of like, or inferiour nature, *Qui semel Actionem renunciavit amplius repetere non potest.* But regularly a *Nonsuit* is not so, but that he may commence an Action of like Nature, &c. See *8 Co. fo. 58. and Co. Lit. 139. a.*

In pleading the Grant of a Reversion, you ought to shew, that it was by *Deed or Fine*; otherwise 'tis ill, *1 Cro. the Grant 143. Dyer 174.*

But *quare*, if Attornment be alledged, whether it shall not be intended.

*Revocation of
a Warrant of
Attorney.*

If an Attorney appear for his Client, and accept of a Declaration, the Client cannot revoke his Warrant of Attorney with an intent to stay the Plaintiffs proceedings, *Pract. Regist.* 292.

*Recital and
Misrecital of
a Statute.*

If a Statute be misrecited in pleading a Matter, which goes to the Ground of the Action which is brought upon the Statute, it is not helped after Verdict by the Statute of *Jeofails*; but if it be mis-recited only in a Circumstantial Matter, and which goes not to the Ground of the Action, it is helped, being Form, and not Substance, *Idem 296.*

*Statute-Staple,
&c. how to be
pleaded.*

Statute-Staple: In pleading thereof, you ought to say, *Quod per scriptum suum Obl' secundum formam Statut' coram* (naming them) *concessit se teneri* (&c.) *in* (&c.) *solvend'* (&c.) *Et si deficerit* *voluit & concessit per idem scriptum, Quod* *incurreret super se Hered' & Executor'* *pena in Statut' Stapul', &c.* othewise 'tis ill, 1 Cro. 362.

*Traverse;
where needful,
where not.*

Traverse: A thing which is only Inducement, and not Substance of the Plea, must not be traversed, 1 Cro. 64,

But

But a Traverser ought to have an Inducement, to make it relate to the foregoing Matter; or else it is not good and formal, *Pract. Reg. 218.*

There shall not be a Traverse upon a Traverse, where the first Traverse is Material; but if it be not Material, there you may Traverse the Inducement to it; but when the Title is traversed, there you ought to maintain the Title, and not to traverse the Inducement, *1 Cro. 105. H ut. 79. Hob. 104.*

If a Defendant plead a Release, he must Traverse all Trespasses after; if a Feoffment, all Trespasses before; if a Lease, or Licence for a time, then all Trespasses before and after, *Hob. 104.*

Digby and *Fitzherbert.*

If in pleading one say, That such a Term ; what Judgment, &c. without naming any Day, it shall be intended the first Day of the Term; that is, the Essoin-Day, which is the First, *Pract. Reg. 325.*

But by the Statute 29 Car. 2, they shall be accounted from the Day they were Signed.

The Four Days of the Term are,

1. Of Essoin, { 3. Appearance,

2. Exception, { 4. Return,

See 1 Cro. 102. 2 Cro. 384. Dy. 361.

Pract. Reg. 325.

But this Rule may hold to other things.

*Tender of Rent
to save the
Forfeiture of
a Lease.*

Tender of Rent to save the Forfeiture of a Lease ought to be of the whole Rent then due, without deduction of Taxes, or Payments, *Idem* 327.

Vide anteā p. 208.

*Trespass; Vi
& armis must
not be omitted
therein.*

If one bring a meer Action upon the Case, he may declare, omitting the words *Vi & armis*; but if the Action be a bare Action of Trespass, there *Vi & armis* must not be omitted; for it implies a breach of the Peace, *Pract. Reg. 323.*

If it be in the Writ, and not in the Count, 'tis Error, 1 Cro. 407.

*Conclusion of
the Plea in
Trespass.*

For the Conclusion of this Plea, see *Kitch. 219, 220.*

Where it shall be *Que est eadem*, see *Latch. 236, 475, 476.*

*Traverse of
Time and
Place, when,
and where.*

In every Transitory Action, if the Defendant justifie by Special Plea in another County, and agree in time, he must Traverse the place: But if he Justifie at another place in the same County, there needs no Traverse; but conclude *Que est eadem, &c.* 1 Cro. 228. 3 Cro. 667. 3 Rol. 264.

Vide anteā, Justification, p. 128.

The

The Pannel upon Tales ought to be Tales; how
Return'd thus: *Nomina Fur' de novo im-*^{the Pannel}
posit' secundum formam Statut', &c. other-^{must be return-}
wise 'tis Error, *Yelv. 214.*

The Coroner who returns the *Veni-* ^{He who returns}
re fac', ought to return the Tales, *Dyer* ^{the Venire,}
24. 376. e. ^{ought to return}
the Tales.

See 1 *Inst. 158. Mo. 356. 3 Cro. 894.*

Issue; Whether such an Order of ^{Trials; Who-}
Chancery, or not, shall be Tried by the ^{ther such an}
Country, *Yelv. 224.* ^{Order of Chan-}

The Time of Inrolment of a Deed ^{Cery, or not.}
is Triable by the Country, *4 Co. 71.* ^{The time of}
Inrolment of

Knight, or no Knight, how to be ^{a Deed.}
Tried, see *Yelv. 34.* ^{Knight, or no}

But if it be pleaded, That such a ^{Sheriff by the}
one is not Sheriff; and *Repl'*, That he ^{Kings Letters}
was made Sheriff by the Kings Letters ^{Patents.}
Patents, prout patet de Record'; Rejoynd'
Nul tel Record; it shall be Tried by ^{For Mis doing,}
the Record, and not by the Country, ^{Ill doing and}
1 Cro. 421. ^{Negligence.}

Vi & Armis. Vide ante p.

Vi & armis,

One cannot do a thing *Vi & armis*, ^{Where an Act}
& contra Pacem, where the Land is ^{is done by the}
his own, *Het. 74. 1 Cro. 377. 2 Rol. 83.* ^{Owner of the}
In Actions upon the Case, for Mis- ^{Land.}

doing or Ill-doing, may be Vi & armis, ^{For Mis doing,}
or for Disturbance in an Office; but for ^{Ill doing and}
Negligence, or not Doing, it must not ^{Negligence.}
be so, 9 Co. 50.

Also

*In Action for
Disturbance
in the Church.*

Also in an Action for Disturbing a Seat in the Church, if the Writ be *Vi & armis*, 'tis ill, 1 Rol. 139.

So if *Vi & armis* is in the Writ, and not in the Count in Trespass, 'tis Error, 1 Cro. 407.

*Videlicet; its
Office is to ex-
plain foregoing
words.*

The word [*Videlicet*] is used to explain the foregoing Words in a Deed, or other Writing; and if the Words which the *Videlicet* does usher in, be contrary to the preceding words, they are void, Pract. Reg. 353.

*To ascertain
Time, &c.*

So if it be used to ascertain the Time, where the Time is not material, and is made contrary to the Premisses, 'tis void. See *Latch* 200, 209, 2 Cro. 97, 428, 618. 2 Len. 102. 1 Cro. 284.

Scilicet.

And so 'tis of the word *Silicet*. See *Telv.* 93, 182. 2 Cro. 96, 152, 662. 3 Cro. 766. contr.

*Venire ubicun-
que in the Roll,
and omitted in
the Writ.*

If upon the awarding a *Venire* upon the Roll it be returnable *Ubicunque*, and the Writ is made *Coram nobis*, omitting *Ubicunque*, 'tis ill, *Telv.* 60.

*No Venire
from a Ward.*

A *Venire* shall not be from a Ward of a City; for that is as a Hundred in a County, 1 Cro. 165. 2 Cro. 308. 3 Cro. 260.

See 2 Cro. 222. contr.

The

The *Venire* shall not be of a larger Not larger in
precinct than the Plaintiff counts of in Precinct than
his Declaration ; as if the *Narr'* be the Count.
apud A. in Com' B. and the *Venire* is, *de*
Vill' & Paroch' de A. 'tis ill, *Yel. 104. 2*
Cro. 586.

In an Action for Words, If the Defendant Justifies, the *Venire* shall be Upon a Justification of where the Justification is, and not Words, how the where the Words are said to be spoken, *Venire shall be.* *Yelv. 49. 2 Car. 43.*

When a *Venire* shall be from two *Vills*. *Venire from See 2 Cro. 599. Yelv. 26, 182, 187. two Vills.*

See much concerning *Venue* and *Venire* in *Pract. Reg.* pag. 328, 329, 330,
331, 332, 333, 334.

See also much good Learning concerning the same, in the Book called *Trials per Pais*, fo. 24, 38, 50, 64, 75, &c.

If a Jury find the Issue, and some Verdict finds Material thing after, 'tis idle and void, *the Issue, and 1 Cro. 76, 130, 212. Hob. 54. something else.*

If Trespass be in one Acre of Land, *Trespass in one Acre, Verdict in dimid' Acr' infrascript'*, That the Defendant is Guilty in *dimid' Acr' infrascript'*, 'tis in *dimid' Acr' infrascript'* good in Trespass ; but otherwise in Execution, *Yelv. 114, 228.*

A Verdict that is found against a Verdict against Record, is void ; for the Record is of a Record. greater Credit, *Pract. Reg. 334.*

See

*Verdict, and
Repleader.*

See the Statute of *Jeofails*, for aiding Defects after Verdict, as where no Issue is joyn'd, and yet a Verdict; and here 'tis said must be a Repleader, *Idem 338.*

*Verdict found
Modo & for-
ma.*

If in *Trespass*, the Verdict find the Tenure in Substance, though not *Modo & forma*, 'tis good; but otherwise in *Replevin*, *Yelv. 148.* 9 Co. 36. 3 Cro. 799.

See much about Verdicts, *Pract. Reg. 334, 335, 336, 337, 338, 339, 340.*

See *Trials per Pais* 164, 210, &c.

*Variance be-
tween the Mat-
ter and Man-
ner.*

If there do appear to be a material Variance between the Matter pleaded, and the manner of the pleading it, the Plea is not good, *Pract. Reg. 342.*

*Uses evaded,
how, &c.*

An *Use* and a *Trust* were all one at the Common Law, and did both rest in *Privity*; but are now distinguish'd by the Statute 27 H. 8. And the way of making Conveyances by way of *Trust*, was invented to evade the Statute of *Uses*, *Idem 327, 340.*

Usury.

Usury, vide ante p. 32.

In pleading the Statute in Avoidance of a Bond, for payment or performance of an Usurious Contract, you must shew *Quod corrupte agreeatum fuit*, otherwise 'twill not be good, See 1 Cro. 501. 2 Cro. 508.

If

If Outlawry be pleaded in Disabilit-
ty of the person of the Plaintiff, the
Defendant ought to shew the Re-
cord thereof presently, *sub pede Sigilli*,
unless it be in the same Court; but if
it be pleaded in Bar, he shall have a
Day to bring in the Record, 1 Inst.
128.

In Debt upon Contract; Defendant
pleaded Outlawry after Imparlace. Plaintiff replied, *Nul tiel Record*, and at the Day the Defendant failed there-
in, and Judgment final was given, 1 Cro. 556. 2 Cro. 448.

But if one Outlawry had been Re-
versed after the Plea, 'tis otherwise.

For in Debt upon Bond, the Defendant pleaded Outlawry in Bar. The Plaintiff replied, *Nul tiel Record*, and Nul tiel Record given; and in the mean time the Plaintiff reversed the Outlawry, and thereby it became *Nul tiel Record ab initio*, and the *Repl'* was good notwithstanding, it being pleaded in Bar, and true at the time of pleading thereof; and the Defendant brought not in the Record by reason of the Reversal; Judgment final was not given, but a *Respondes Ouster*. Telv. 36. 8 Co. 142. Dyer 228. 1 Brownl. 833. 1 Cro. 566. 2 Cro. 484. 3 Cro. 270.

In

*Waste in Half
an Acre.*

In Waste against a Tenant for Half
a Year, it shall be said, That he holds
ad Terminum Annorum, and 'tis the Form
I Cro. 430.

Way.

Way; How to be pleaded and set out;
vide ante p. 209.

Words uncertain, may be made certain.

Words which are in themselves uncertain, may nevertheless be made certain by subsequent Words. *Pract. Reg.*

The same Words
differently
placed, alters
the sense.

The different placing of the same Words, may cause them to have a different sense or construction, *Idem*

Simul &
Simul cum.

The Word *Simil* is not a word Copulative, when 'tis joyned with the Word [Et]; but *Simil cum* are words Copulative, *Idem* 352. Heb. 10. 14. v. 1.

Ambiguous Words, how be construed

Words ambiguous ought to receive such a Construction, as may make them stand with Law and Equity, *Idem*

Words abbreviated without a Dash.

A Word which is abbreviated, or written short without a Dash, is not good; for the Dash is the distinction,
Id. 25 I.

See before, p. 29, 55, 56.

And obferve after.

C H A P. VI.

Concerning Bars to Actions of Account,

&c.

Every Plea must be pleaded either in Bar to the Action brought, or in Abatement of the Writ upon which the Action is brought, &c. *Vide ante p. 97.*

Some Bars are to a Common intent, *Bar to a Com-* and some to a Special. See *Touch. Prec. mon intent.* 68, 69, 70, 71.

Vide ante p. 58.

Some Bars are *pro tempore*, and some *Bar pro tem-* perpetual, See *Touch. Prec. ut supr. pore, &c.*

Vide ante p. ibid.

For the Bars to Actions, take the Rules and Directions following.

A Recovery in a personal Action, *Recovery plead-* is a Bar in all other Personal Actions *ed in Bar to* touching the same Matter; That is to *Personal Acti-* say,

It is a good Plea in Bar to a Personal Action brought against the Defendant to say, That the Plaintiff did formerly bring an Action against him for the same Matter, and did recover against him: And therefore he prays the

the Judgment of the Court, Whether he shall be permitted to proceed in his Second Action, *Pract. Reg.* p. 40. *Hil. 21 Car. B. R.*

*Recovery plead
ed.* So in an Action brought, to recover a thing from another, if a Recovery have been thereupon had by the Plaintiff, the Defendant may plead this Recovery in Bar of a Second Action brought against him for the same thing, *Idem 40. 21 Car. B. R.*

*Replication al.
lows the Bar.* If the Plaintiff do reply to the Defendants Plea in Bar; this Replication is a Confession in Law, That the Plea in Bar is a good Plea, although the Plea be not good: For the Plaintiff hath slipp'd his advantage of Demurring to the Defendant's Insufficient Plea, by Replying unto it. *Idem p. eod. 23 Car. B. R.*

*When the Bar
answers not the
Declaration.* A Plea in Bar, which doth not give a full Answer to all the material Matter which is contained in the Plaintiff's Declaration, is not a good Plea. *Idem p. eod. 21 Car. B. R.*

For Bar in Account.

Some Pleas are in Bar of the Account, and some in Discharge before Auditors; and some Pleas will be allowed before Auditors, that will not be allowed in Bar of the Account.

Asto the *Account*, the Defendant may plead, *Ne unques son Receiver ou Bailiffe pur Account render.*

Or that he was sued for the same Cause, and Adjudged to *Account*; and Error brought upon the first Judgment in another Court where 'tis depending, and the like, *Dyer 21. 11. Co. 8.*

As to his Discharge before Auditors, he may plead (if he be not a Receiver) *That he was Robbed, or his Disturbments.* Or, that he hath fully Accounted with the Plaintiff himself, or the like, *4 Co. 84.*

And if a New Action of *Debt* be brought for the Arrearages brought against the Bayliff or Receiver, (as it may be) the Defendant may plead *Nil debet, or Wage his Law,* *5 Co. 53. Stat. Nil diber.*

But for a further knowledge of the Bar in Account, see the *Survey of the Law* by *Glisson* and *Gulson*, under the Title *Account*. See also *Townsend's Tables*.

*For the Plea or Bar in Case, and Assump-
sit, &c.*

*Not Guilty in
Non feasance.*

*In an Action of Non Feasance, Not
Guilt is no Plea, for they are two Ne-
gatives, which cannot make an Issue,
more then two Affirmatives; 1 Cro. 569.*

Nusance.

*For the pleading about a Nusance;
See 1 Cro. 285. Yelv. 210, 215, 225.*

Bailment.

*For those about Bailment of Goods,
Bro. Sect. 82, 198, 405. Yelv. 222.
Leon. 267.*

Suits in Law.

For those about Suits in Law, 1 Cro.

*895, 933, 914. About doing, Not doing and Mis-
doing in other Cases, See Bro. Sect. 382.
See above**

Disturbance.

For disturbing one in his Franchise,

38 H. 5. 15.

House burning.

*For Burning a House, 13 H. 6. 31.
See after.*

Not repairing.

For not repairing, &c. 1 Cro. 285.

*In consideration
of forbearance.*

*In an Action upon an Assumpsit, in
consideration of forbearance against an
Administrator during the Executors
Minority, 'tis a good Bar, that the Ex-
ecutor at the time of the promise was
of full Age; 1 Cro. 546. 1 Rob. 526. 910.*

For

For other pleadings about Contracts *Contracts.*
and *Affumpſits*, See 1 Cro. 179. 201. 2 Cro.

234, 539, 444, 544, 587, 620, 690.

Upon an *Indebitatus*, 1 Cro. 242. *Velv.* *Indebitatus.*
114. 117. *March Rep.* 77. 100. *Hob.* 146.
Noy 82. *Popb.* 207. about buying and selling, 42. *Aſſ.* Pl. 8. *Action, &c.* 42. 7
H. 8. 15. *Action upon, &c.* 27. 9 *H.6.*
53. 1 *Bul.* 124. 155. 1 Cro. 250. 407.
410 *Hob.* 253.

See *Townſend's Tables.*

To an *Affumpſit*, Concord pleaded is *Concord.*
a General Bar, *Li. Intr.* 6. b. *Sectt.* 6.

So is *Non Affumpſit*, and this a Man *Non Affumpſit.*
may plead although there is no conſideration, *Paf.* 26. *Eliz. B. R.*

But if the former were upon an in-tire sum upon two *Affumpſits*, then no *sumpſits for an Bar, Trin.* 14. *Jac. B. R. Paine and Sel-* intire sum. *ley.*

Recovery of Damages in an *Affumpſit*. *Damages re-*
ſtr is no Bar to the Debt upon Specialty, *covered.*

1 Cro. 6.

'Tis a good Bar, that he promised up- *That he pro-*
on Condition which is not perform'd, *mised upon Con-*
Li. Intr. 5 *D. Sectt.* 1. *dition.*

Non Emisset the Land of him a good *Non emisset*
Bar, *Li. Intr.* 6 *B. Sectt.* 5.

That the Plaintiff discharged him of *Discharge.*
the Bargain, a good Bar, *Li. Intr.* 685.
Sectt.

*That he guard
ed his fire well.*

In an Action for negligently keeping his Fire *per quod, &c.* that he Guarded his Fire well, *absque hoc* that he Guarded it negligently, *Lit. Intr. 8. B. Sect. 2.*

That it was not burnt in default of good Custody of the Fire of the Defendant, *Lib: Intr. 8. A. Sect. 1.*

But by 28 Hen. 6. 7. this is but a Negative Pregnant.

Note.

Note, If a Lessee for Years Covenant expressly to repair a House let unto him, and during his Term, the House is Burnt down, he is tied by the Law to repair or New build it, whether it be Burnt by Negligence or otherways, *Pract. Reg. pag. 75.*

*Accord and
satisfaction
when and where
to be pleaded.*

An Accord with satisfaction is a good Bar in a Writ of Covenant, because the Duty accrueth not merely by the Deed, but by a *Tort* subsequent, together with the Deed; and it is a good Bar in an Attaint because this is not founded upon the Record only, but upon the false Oath also; and in all Cases where an Arbitrament is a good Plea, an Accord with satisfaction is also; and so generally in all Actions, where Damages only are to be recovered, 6 Co. 44. a. Blakes Case.

But

But when a certain Duty accrues by the Covenant, at the time of doing it, Accord with satisfaction is no Plea, *Id.*

Solwhere no certain Duty accrues until the subsequent Act or wrong, there Accord with satisfaction is a good Plea. *Idem* fo. eod. *Blakes Case.*

In *Brief de Covenant* where the Breach is, for not repairing the House, Accord between the Plaintiff and Defendant, and execution of it in satisfaction, and discharge of the Defect of the said Repairs, is a good Plea, *6 Co. 44. 2 Cro. 100.*

It was resolved *per totam Curiam*, that Accord in all Actions, wherein is supposed the Tort to be made (*Vi & armis*) where *Cap' and the Exigent* lyeth at the Common Law, is a good Plea, as in *Trespass*, and *Ejectione firmæ, Detinue* of *Charters*, Horse or other Goods; for where the Certainty is to be recovered, an Accord is a good Plea.

When the Condition in a Deed by the Original Contracts of the Parties is to pay Mony, yet by Accord and Agreement between the Parties, any other thing may be given in satisfaction of the Mony, *Res per pecuni-am aestimatur & non pecunia per Rem*, and in this Sense the saying is true,

Q 3 quod

quod pecuniae abediunt omnia, 9 Co. 78.
Peytoes Case.

In Attaint, Accord est bon Plea, 8 Co. 44. 13 Ed. 4. 1. 5.

In Actions where Damages only are to be recovered, Arbitrament or Accord, &c. is a good Plea, though the Action be grounded on Deed or Record; but the satisfaction ought not to be of any thing, whereof the Plaintiff had property, 6 Co. 44. Dyer 75. 356. Telv. 124. 3 Cro. 356.

1. In all Cases *Vi & Armis*,
 2. Where *Cap' & Exigent* lies by the Common Law,
 3. In Ejectment,
 4. In Appeal of *Maybem*, 35 H.6.30.
 5. In Ravishment of Ward,
 6. In Detinue concerning personal chose,
 7. In Detinue concerning Charters of Freehold,
 8. In *Quare ejicit infra Terminum*,
 9. In an Action of Waft in *le tenuit*, but not in *le tenet*, 2 Inst. 307. 6 Co. 44.
 10. In an Action of Debt upon a Lease for years,
 11. In a promise to build a House, *Et similia*.
 12. In an Action of Covenant, &c.
- In all the foregoing Cases, Concord with

78. with Satisfaction is a good Plea. See
3 Co. 78, 79. *Peytoes Case.*
Accord and Satisfaction is a good
Plea in Personal Actions, but not in Real,
9 Co. 78, 79, 80. 6 Co. 44. *Blakes Case,*
13 H. 7. 20. 4 Co. 1. If part of the Agreement is not per-
formed, the Plea is ill, 1 Cro. 193.
And the safest way of Pleading an Accord and
satisfaction is to plead it by way of Satisfaction, and not of Accord only; and to be pleaded,
you need say no more than that the Defendant had paid the Plaintiff in full Satisfaction of the same Action, which the Plaintiff received, &c. *Et Judgment s. Actio*, 9 Co. 80. b. 19 H. 6. 29.
A Covenants to gather the Rents in D. and he Pleads, that he was interrupted by the Plaintiff, a good Bar, 13 Hen. 7. 34. *Pl. 2.*
Lessee Covenants to Surrender before the Term ends, and a Stranger that hath Right enters upon the Lessee; this is a discharge, because the Lessee is disabled, *Hill. 41. Eliz. Com' Banc' Andrews versus Needham*, 45 Ed. 3. 48.
Performance generally is a good Plea, *Performance Pleadis.* 6 H. 4. 8. Pl. 34.

Bars to Actions.

Covenant upon a Demise by Indenture, and Eviction by a Stranger by a greater Title ; It is no Bar to Traverse the Possession of the Plaintiff, without particular Cause shewing, because 'tis by Indenture, *Trin. 3. Fac. B. R. Stiles versus Hearing.*

*Surrender
pleaded.*

*Release where
a Bar and
where not.*

*Assignment
pleaded.*

A. Covenants to make a good Estate in Copihold Land to *B.* before *Easter*, during the Life of *C.* No Plea, to say it was Surrendred to the Lord by his procurement, if he shews not that he was admitted ; for nothing vests in him to whose use it is, till admittance, *Mich. 15. Fac. B. R. Stiles verlus Smith.*

Release is no Bar before the Covenant is broken, (*4 Co. 71. Hors del Case 5 Eliz. Dyer 217. Pl. 2. 1 Co. 99. Shelleys Case,*) if it be not by express words, *5 Co. 71. a. 35 H. 38. Dyer. 57. Pl. 24. Bramlys Case.* Being a general release.

In an Action of Covenant, upon an Express Covenant in the Deed for not repairing the Messuage, &c. it is no Plea, that he hath Assigned his Estate, and that the Plaintiff had accepted Rent from him; for he may sue the Lessee or Assignee, at his Election, *1 Rol. 552. 1 Cro. 188, 580. 2 Cro. 309, 519.*

In Covenant, two Breaches Assigned, *Two breaches
Assigned and
Plea but to one.*
Defendant pleads *Actio non* generally, and not *quoad* the one, and so to the other, and so but to one of them, and not good.

Ed. S.

See *Townsend's Tables*

Bar in Debt.

If this Action be grounded on a Statute or Judgment, it is a good plea, that the Plaintiff hath sued out, and made Execution upon the Judgment or Statute. But regularly no matter in *fact*, as Payment or the like, is a good Plea to this Action grounded on a Record, *Dyer. 299. 22 Ed. 4. 6. 6 H. 4. 6.*

If the Action be grounded on a Real Contract, as if it be for Rent on a Lease of years, 'tis a good Plea in Bar to the Action to plead any of the Matters following, *viz.*

1. That the Lessee was ejected out of the Land by a Stranger that had Title Paramount, that entered and kept him out.

2. That the Lessor entered upon all or part of the Land demised, before the day of payment of the Rent, and doth keep out the Lessee always, so that he cannot take the profits; but if the Lessee Re-enter this is no Plea.

3. That

*That the lessor
had nothing in
the Land.*

3. That the Lessor had nothing to do with the Land demised at the time of the making of the Lease; but if the Lease be by Deed indented, then this is no Plea.

Nothing arrear.

4. That the Rent was paid at the day, and that there is nothing arrear: And though the Lease be by Indenture, yet payment is a good Plea.

*That the Plaintiff
distressed.*

5. That the Plaintiff has distrained for it, and recovered the Money by that means, and so levy by Distress: But it will be no good Plea to say that the Houses were so Ruinos that the Lessee could not dwell in them, and the Lessor by Covenant or Custom ought to repair them.

For the Authorities in these Pleas, See *Dyer 28, 82, 212, 299. p. 34. 22 Ed. 4. 6. 6 H. 4. 6. 3 Co. 22. 10 Co. 127. 27 H. 6. 20. 37 H. 6. 10 Dyer 106.*

*Bars to a per-
sonal contract
on specialty.*

If the Action be grounded on a personal Contract in Writing, as upon an Obligation or other Specialty, if it be single or with Condition to pay Money at a Day,

*Tender and re-
fusal.*

1. It is a good Plea to say he paid or tendered, and the other refused the Money at the day of payment.

*Condition per-
formed.*

2. That he hath performed the Condition of the Obligation, or that the Plaintiff sued the same Obligation before, supposing the Condition was broken

broken, and was barred therein.

But in case of a single Bill, payment *when and where a good Plea.*
is no good Plea, 5 Co. 43. Dyer 51. 256. *Plea.*
1 H. 7. 14.

So neither for a single sum in a Bill
penal, 1 H. 5. 7. But 'tis otherwise to
the double sum in a penal Bill, for
there payment of the single sum is a
good Plea.

3. And regularly no matter, unless it *Matter in writing regularly*
be in writing, is a good Plea to an Action grounded on a Specialty, as that *the best Plea.*
the Money was paid after the day, and
the Bond delivered up, and the Plaintiff
came by it casually again; neither
is Arbitrament and Accord with satisfac-
tion a good Pleas

See for the Authorities of these 21
Ed. 4. 41. Lit. Sect. 338. 1 Co. 113. Br.
Sect. 106. 8 H. 7. 3. 5 Co. 43. 1 H. 7. 17.
Dyer 51.

4. If it be a Debt on a Contract without *Bar to a Con-
Especialty, in which Action Wager tract without
of Law doth lye, it is a good Plea, Specialty.*
that before this time, the Plaintiff
brought another Action for the same *Law wager in
Debt, and the Defendant waged his another Action.*
Law, and barr'd the Plaintiff therein.

Or that the Plaintiff brought an *Recovery plead-
Action of the Case for the same Debts, ed.*
before, and recovered the same there-
in.

Or

*That he oweith
nothing.*

*Decree in
Chancery.*

Or that he oweith nothing, but hath paid the Plaintiff, See 4 Co. 99. n. 1

5. But in this Case of parol Contract without Specialty, 'tis no good Bar to say there is a Decree in Chancery, that the Plaintiff shall release the Debt, and take no advantage of it.

*The Goods were
taken from the
Buyer, &c.*

Or if it be for Goods sold, That the same were taken from the Buyer, by one that had Right before the day of payment.

*Agreement to
keep the Goods.*

Or that the Plaintiff agreed, that the Defendant shall keep it for another Debt the Plaintiff did owe to him.

*Obligation by
a Stranger.*

Or that a Stranger hath made an Obligation to the Debtee for the same Debt, Fitz. Bar. 75. 3 Co. 22. 28 H. 6.

4.

6. Whether the Debt be grounded on *Release pleaded.* a Specialty or not, generally a Release from the Party to whom 'tis owing, his Executor or Administrator, is a good Plea.

*Something else
in recompence.*

Or that the Defendant did give, and the Plaintiff accept something else in recompence thereof, is a good Plea in Bar.

*Statute pleaded
in Bar to an
Obligation.*

Yet if a Debt be due on an Obligation, and I take a Statute for this Debt from the Obligor, this doth not determin the Debt due by the Obligation, but I may sue upon either of them

them at any Election, and the Statute
is no good Bar to the Obligation.

Nor is it a Bar to any Action of *Grant of a*
Debt, That he did grant the Debtee *Levy upon*
that he should levy it upon his Land. *Land.*

See 6 Co. 45, 49. 9 Ed. 4. 50. 34 H. 6.

17. Bro. Debt. 29. *and ch. 22. v. 1. 29. 20.*

1. In many Cases a Debt may be dis- *Debt discharg-*
charged, as where the Debtor makes *ed.*
the Debtee his Executor, and he ac-
cepts it.

2. Or if the Debtor take the Debtee *Debtor marries*
to Husband or Wife. *Levy upon the Debtee.*

3. Or if two or more be bound in an *Simile.*
Obligation to a Feme Sole, and she take
one of them to Husband, 21 H. 7. 229.

In all these Cases the Debt is gone
and discharged, 8 Co. 136. Plow. 364.

4. So if Judgment be had on a Spe- *Judgment upon*
cialty, the Debt upon the Specialty is *Specialty.*
gone.

So if a Debt be upon a Contract, or *Obligation dis-*
Arrearages of Account, and after the *charges a Debt*
Debtee take an Obligation from the *by Contract.*
Debtor for the Money; in this Case the
Debt upon the Contract is gone.

But if the Obligation be made by a
Stranger, 'tis otherwise.

Fitz. N. B. 120. M. Dyer 21. 6 Co. 45.

28 H. 6. 4. *and ch. 22. v. 1. 29. 20.*

But

But see more in the Survey of the Law, and Touch of Precedents, Tit. Dekt.

See also Townsend's Tables.

Two Breaches assigned.

Debt upon Bond to perform Covenants, if you assign two Breaches, it is double, because one is sufficient for the Penalty. Ed. S.

Bar in Detinue.

Bar in Detinue 'Tis a good Plea to say, the Things were delivered, to be delivered over to another; and that he did deliver them over accordingly, and good (if there was not a Countermand) although the Delivery over be after the Writ brought, F.N.B. 38. 5 H.7.18. 12 E. 4. 8

That the Horse was sick, &c.

If the Writ be for a Horse, it is a good Plea to say, That the Horse was sick of divers Diseases at the time of the Delivery, and that he died thereof before any Request was made for Redelivery, 21 E. 4. 5.

The thing delivered before the Action brought.

Also 'tis a good Plea to say, That he offered to deliver, or did deliver the thing demanded, before the Suit brought, 12 E. 4. 8.

That after the delivery the Plaintiff gave the Goods to the Defendant.

So to say, That the party that did deliver the Goods, did afterwards give them to the Defendant, 21 E. 4. 55. 12 E. 4. 8.

So

So for a Taylor to say, He doth keep *A Taylor keeps the Garment*
the Garment for his Money: And so for
an Hostler, That he keeps the Horse *for the Money.*
for his Meat, 5 Ed. 4. 2.

So for him that is sued for a Pledge,
That the Goods were stolen before the
Money was tendered, 4 Co. 23.

So if the Suit be for Goods which I *That the Defendant took*
had taken in, I may plead, I took them *the Goods with*
in which special Caution; or that I un-*a Caution*
dertook them generally, had nothing *That he had*
for them, and the Goods were stolen *nothing for*
from me, 4 Co. 84. 10 H. 8. 21. 29. *Ass. taking them in.*
28. 3 H. 7. 4. 10 H. 7. 26. Hil. 16 Jac.

B. R.

See 4 Co. 83. cont.

If the Action be for Goods found, I *That he delivered the*
may lay, That I delivered them away *Goods found*
before the Writ was brought, 27 H. 8. *before the Writ.*
21.

So if the Action be for Cattel I had *That the Cattle*
to keep, I may plead, That they died, *were slain*
or were stoln.

Or if it be for Goods taken out of a *That the Owner*
Coffer in my House, I may plead, That *had the Key*
the Owner had the Key of it. *of the Coffe.*

And so any other thing before, shew- *General Rule.*
ing that the Action will not lye, may
be set forth in avoiding of the Action.

Vide ut supra.

See Townsendl's Tables.

Note,

*Where this
Action lieth.*

*Trover and
Detinue may
be brought in-
differently.*

*The difference
between Trover
and Detinue.*

Note, This Action of *Detinue* will lye for me against another, that cometh to my Goods, Cattel; or Writings, either by finding, or by my delivery of them to him, either to keep, or to re-deliver to me, or to deliver over to another, and he doth not so, but refuseth to do it; or detaineth, loseth, or misemployeth them.

And it is held, That in most Cases where I may have an Action of *Detinue* for Goods detained from me, that I may at my election convert this Action into an Action of the Case, as *Trover*, &c.

See *Ca. Lit.* 286. *Dyer* 202, 331. *Kel.* 64, 184. *Plow.* 90. *Yelv.* 164, 194. *Bendl.* 170. *March's Rep.* 59. 18 *E.4.* 23. 8 *H.7.* 10.

See also *Stile's Pract. Reg.* p. 6 *Stile's Rep.* fo. 3 *Leon.* pl. 303, 304. 1 *Bulstr.* 29, 68, 95, 120, 127, 170.

Note also, This Action of *Detinue* must be brought for Personal Goods valuable and certain; as for Cloth, Household stuff, Horse, Cow, or Money in a Bag sealed, or Chest lock'd, or for Evidences of his Land, sealed or lock'd up, &c. but not for Money out of a Bag, or Chest, or Corn out of a Sack: And he taketh his Action of *Detinue*, that intendeth to recover the thing delivered, and not as much Damages as the

the things be worth; as in *Trover, &c.*
Fitzb. N.B. I 38. See *Kitch. fo. 176.*

Yet the Judgment in *Detinue* was, *Judgment in*
That he should recover his *Chattels, Detinue.*
and his Damages. *21 H.6.36.A.*

And that he should recover the Deeds,
if they are found, and also Damages;
and if not found, then all in Damages.
7 H.6.31.pl.25. 22 H.6.41.pl.17. 17 E.
3.45.pl.1.

See *L. Intr. 218.a. Sect. 1. 219.D. Sect. 17.*

Non tenetur precise ad Rem restituend',
sed sub dijunct', vel ad rem', vel ad pre-
mium. Bract.lib.3.fo.102.

Note, There are now-a-days more A-
ctions of *Trover* brought, than Actions
of *Detinue*; because the Defendant ⁱⁿ *than Detinue;*
Trover cannot wage his Law, as in *an* ^{and the Re-}
Action of *Detinue* he may. See *Compleat son.*
Solicit.p.222.

Yet if a man brings his Action of
Detinue for his Evidences in a Bag seal-
ed, and declare for one Evidence in Spe-
cial; the Defendant in this Case shall
not wage his Law. *Idem p.173.*

An Alien shall Wage his Law in that *Law.Wager.*
Language which he can speak. *Idem*
p.249.

An Infant under the Age of 21 years,
shall not wage his Law; and if an In-
fant be Plaintiff, the Defendant cannot
Wage his Law. *Idem ibid.*

See more of *Ley Gager, p.80, 117, 160.*

*Bar in Dower.**Bar in Dower.**Joyniture
pledged.**And how it
must be.*

A Joyniture was anciently no Bar of Dower at the Common Law; but now it is by the Statute of 27 H. 8. if the Joyniture be made to the Wife, according to the Statute, *wiz.*

1. It is to take effect for her Life in possession, or Profit, presently after the decease of her Husband.
2. That it be for Term of her own Life, or greater Estate.
3. It must be made to her self, and no other for her.
4. It must be made in lieu and satisfaction of her whole Dower, and not of part thereof.
5. It must be either express'd or averr'd, to be in satisfaction of her Dower, &c.
6. It may be made either before or after Marriage. *Co.Lit. 36.a.*

A Joyniture made to the Wife, under or above the Age of 9 years, is good.
Idem 37.a.

*Joyniture before
Marriage.*

If a Woman have a Joyniture before Marriage, she cannot waive it, and claim her Dower at the Common Law.
But

But if it be made after Marriage, she may waive the same.

See *Noy's Max.* p. 29. Co. Lit. 36. b.
Dyer 358.

If it be made during Marriage, she *How the Wife shall be Endowed.*
may enter presently.

If she enter and accept it, she shall not be Endowed.

If she be expelled of any part of her Joyniture; she shall be Endowed of the residue of her Husband's Lands. *Noy ibid.*

She shall not be Endowed of what her Husband at his Death held joynly; but 'tis otherwise of what he held in Common.

See for this Co. Lit. 37. b.

See also *Noy Max.* 2. 8.

To an Action of *Dower* there be several Pleas, as the Case may require.

One usual Plea is, *Ne unques seisi que Dower, id est, The Husband was never seised of any Estate whereof the Wife can be Endowed.* Ne unques seisi que Dower pleaded.

There is also another Plea in Bar, called *Nontenure.*

The Defendant pleads, That he *Nontenure* cannot render the Demandant her *pledaded.* Dower, because he is not thereof Tenant, as of the Freehold, nor was at

the Day of the Issuing forth the Original Writ, of her the said Demandant, nor at any time after, *Et hoc paratus est verificare, unde petit' Judic' brevis praedit'*, &c.

See New Book of Ent. verb. Non tenure. 25 Ed. 3 Stat. 4 ca. 16.

Repl' adiude.

To this the Demandant may Reply, That her Writ ought not to be quash'd for any thing before alledged, for that the Day of issuing forth the Original Writ of her the Demandant, viz. (*tali die & Anno*) the Defendant was Tenant of the Land, &c. as of his Freehold; as by the same Writ is supposed,

Et hoc petit' quod inquirat' per Patriam,
Et praedit' Def. similis, &c. Ideo, &c.

Noage
pleaded.

Noage may also be pleaded in Bar of Dower; viz.

That the Demandant, at the time of the Death of her Husband, was not of full Age, that she should deserve Dowry; that is to say, of Nine years and half.

Et hoc paratus est verificare, unde petit' Judic', si praed' A. Dotem suam de tementis praedit' cum pertin' habere debeat,
&c.

Repl' adiude.

To this the Demandant may Reply, That she was of full Age, &c.

Et petit', Quod inquirat' per Patriam,
&c.

There

There is also another Plea in Dower, Elopement called *Elopement*; that is, She left her ^{pleaded.} Husband and liv'd in Adultery with another, during the life of her late Husband, &c.

See *Compleat Solicit.* p. 226, 227.

An Annuity may also be pleaded in *Annuity* Dower. *Idem.* ^{pleaded.}

Note, That by the Justices, by the *Wife was made Statute where a Man makes his Wife joyn Purchaser* joyn Purchasor with him after the Co-*sor.* verture, of any Estate of Freehold; (Except it be to him and his Wife, and their Heirs in Fee-simple) this is Bar of Dower, if she agree to the Joyniture *post mortem viri.*

So if he make a Feoffment to the use of himself for Life, and after to the use of his Wife. 4 C. 2, 3.

Otherwise of Fee-simple, for such *Otherwise of Fee-simple.* Joyniture is not spoken in the Statute.

Nor a Devise of Land by the Husband to the Wife by Testament, is no Bar to Dower; for this is a Benevolence, ^{Devise of Land by the Husbands Will to the Wife.} and not a Joyniture. 6 E. 6. Bro. *Dower* 69.

If in this Action of *Dower*, the Tenant have no Special Matter in Bar thereof, his best way to save Charges, is to confess the Action by *Non sum Informatus*, or let it go by Default.

See *Compleat Solicit.* 227.

R 3

Observe,

Venit & dicit.

Observe, That in this Action of *Dower*, (as in all other Real Actions) when you plead for the Defendant, you say only *Venit & dicit*, and not *Venit & defendit vim & injuriam, &c.* as in other Personal Actions.

Dower of Common of Pasture.

If the Plaintiff demand *Dower de Terr' prat' pastur' & commun' pastur' pro omnibus averis cum pertin'*, and the Tenant plead, *Ne unques seisi' que Dower*, it is made good; otherwise ill; *Quia Communia est demand' per Terr' cum pertinen'*. Jon. 315. 1 Rol. 675. 1 Cro. 300.

Already Endowed.

Therefore to say, That she is Endowed already of the same Land.

That the Husband was never seised.

That the Husband was never seised of any dowable Estate. *Dyer 41.*

That he was Attainted.

That her Husband was Attainted of Treason. *Stat. 5 Ed. 6. 11.*

Joynture before Marriage.

That she had a Joynture of her Husbands Land, made to her before Marriage, and she is not evicted out of it. *Stat. 27 H. 8. ca. 10. 4 Co. 59.*

Joynture after Marriage.

That she had a Joynture made after Marriage, and she hath entred upon it, and accepted of it since her Husbands death. *Stat. 27 H. 8. ca. 20. **

That she levied a Fine with her Husband.

That she did joyn with her Husband in his Life-time, and levy a Fine, or suffered a Recovery of the Land. *2 Co. 74. 9 Co. 97.*

That

That the Husband alone did levy a Fine of the Land, and she did not make her Claim in five years after his death.

That the Husband alone levied a Fine.
2 Co. 93. & Co. 100.

That her Husband and she were Divorced *a vinculo Matrimonii.* Co. Lit. *Divorced.*

321.

But if the Divorce were *a Mensa & Thoro* only ; this is no Bar. *Idem.*

All these, and the others before-named, and many more, may be pleaded in Bar and Avoidance of the Action of *Dower* for ever.

But Note, 'Tis no Bar of Dower to say, Her Husband was Attainted of Murder or Felony. *Co. Lit. 31.*

That her Husband was Attainted of Treason, and Outlaw'd.

Or that he was Outlaw'd in an Action. *Perk. Sect. 388.*

* Or that she had a Joyniture made to her after Marriage, if she waive it after her Husband's death, 4 Co. 2.

Joyniture waiv-ed after Marriage.

Or if a Joyniture be made to her after Marriage, and during the Coverture she and her Husband levy a Fine, or suffer a Recovery of it ; this is no Bar to her Dower in the residue of the Lands.

Fine levied of a Joyniture made after Marriage.

2 Co. 27. *Dyer 358.*

Nor is it a Bar to her to say, That her Husband was an Ideot, or *Non compos mentis.* Co. Lit. *ut supr.*

That the Husband was an Ideot.

*Heir pleads,
That she de-
tains his Evi-
dences, &c.*

*That she hath
entered upon
part of the
Land.*

*That she hath
a Lease of the
Lands, &c.*

*Unques prist,
Semper para-
tus.*

Yet if the Woman detain the Writings of the Heirs Land, the Heir may plead this in Bar; and 'twill be a Bar for so much Land as the Evidences do belong to, and for so long as she doth keep them. 9 Co.17. Dyer 127, 250.

So if she enter upon any part of the Land, out of which she doth demand Dower; so long as she keepeth in possession of it, she is Barr'd. Dyer 76.

So also, if after her Husband's death she take a Lease for years or life, of the Land whereof she is to be Endowed; so long as the Lease doth last she is Barr'd; and this may be pleaded in Avoidance of the Action. F.N.B. 149. Perk. Sect. 350.

Unques prist, id est, Semper paratus, pleaded by a Tenant sued for Dower, &c. unless the Demandant will aver the contrary, she shall recover no Damages.

When this Plea will serve to avoid Charges, and when not, see *Kitch. fo. 243.*

See also *Townsend's Tables.*

Bar in Ejectment.

Accord with Satisfaction is a good *Accord with Bar*; because 'tis but in the nature of *Satisfaction*.
Trespass. 9 Co. 78.

Duresis, a good Bar. *Lib.Intr.253.b.* Sect.

10.

Non ejecit a good Bar, *si bona & catalla Non ejecit.*
are not in the Writ. 7 E. 6. 89. pl. 111.

19 H.6.56.

But if such Words be in, *quero.*

That the Lessor had it but in right *That the Lessor*
of his Wife, and he enters after the *had it but in*
death of the Lessor, in right of his *Right of his*
Wife, &c. *Lib.Intr.252.D.Sect.8.*

That he Surrendred before, *Et quoad That he Sur-*
non Ejecit, a good Bar. 21 E. 4. 10. pl. I. *rendred before,*
30.pl.25. *&c.*

See for this in *Survey of the Law*,
Tit. eod.

See also *Townsend's Tables.*

Bar in Quare Impedit.

See for these at full in *Survey of the*
Law, *Tit.Quarre Impedit*, and *Touchstone*
of Precedents, *Tit.eod.*

See also *Townsend's Tables.*

For Bar in *Replevin* and *Avowry*;
see the same Books under these
Titles, &c.

Bar

Bar at Slander.

*General Rule,
Confession and
Justification.*

When the Defendant confesses the Words, and Justifies them, or by Special Matter shews that they are not Actionable, he shall not be bound to the General Issue. 4 Co. 12, & 14.

*Justification
amounts to
Not Guilty.*

But where a Justification amounts to a bare *Not Guilty*, 'tis Cause of Demurrer. Cro. Car. 157.

*The occasion of
the Words
shewed.*

It is good to shew the occasion of the Words, and how; and to plead it in Excuse of the Defendant. 4 Co. 14.

*Bar may help
the Faults in
the Declara-
tion.*

And where the Declaration is faulty, the Bar may sometimes help it, especially if the fault be only Form of the Words.

See 1 Cro. 65, 144, 303.

*When, and
where the De-
fendant may
justify.*

If the Words which the Plaintiff charges the Defendant to have spoken were true, tho' Actionable *prima facie*; the Defendant may Justify the speaking of them, and in such Case must not plead *Non Culp'*.

See Dyer 236. Hut. 73. 2. Cro. 91. Otherwise,

*In setting forth
the Remainder
of the Words
left out in the
Declaration.*

The Defendant may in this Action plead *Not Guilty*. Or if the Plaintiff declare upon some of the Words only, where all of them together are not Actionable; then the Defendant may set

set them forth at large, as he spake them, and traverse, justify or plead *Not Guilty* to the rest of the Words, as the Case requires: So in all Cases where the Plaintiff shall omit any thing material on the Defendants part, the Defendant may plead it by way of Bar.

See 1 Co. 17. 4 Co. 13, 19.

See also New Book of Entr. 24, 25, 26.

If in this Action the Plea be *Not Guilty*, and part of the Actionable words only be found, this its said will maintain the Action; but if the Defendant take a Traverse to the Words, 'tis otherwise. *Noy's Rep.* 134.

Where the words may be justified *Justification ex causa dicendi*, there its said the Defen. *causa dicendi*,
dant may (if he please) take the General Issue, *Not Guilty modo & forma, &c.* and give in Evidence of the Coherence, Occasion, or the Connexion of the Words; or (as the Cause shall require) he may justify the speaking of other words, and traverse the speaking of the Words in question, and upon Evidence have the Words Specially found.

And when the Matter in Fact will *General Rules* serve for the Defendant, albeit he may suppose, that the Plaintiff hath no Cause of Action; yet 'tis not safe for him to hazard his Case upon a Demurrer.

murrer, But first let him take his advantage of the Matter of Fact, and leave the Matters in Law, which arise upon the Matters in Fact, to the last; for after Trial the Matters in Law shall be saved to him. *4 Co. 14.*

See *1 Cro. (last Publish'd) 239, 492.*

What Damages to be recovered.

If the Action be only for Words, and the Plaintiff Recover, he is to have no more Costs than Damages; but if be for Words and Deeds together, as Slanderizing and causing Imprisonment, &c. there he is to have full Cost. *Cro. 1.*

223.

If the Plaintiff be Nonsuited, the Defendant shall have Costs. *Hobart 386.*

Accord with Satisfaction.

It is a good Bar to an Action on the Case, in the nature of a Conspiracy, to plead Accord with Execution. *21 H. 6.28.*

That the Indictment was Erroneous.

So to shew, that the Indictment upon which the Acquittal was, was Erroneous; notwithstanding that the party Indicted did not take advantage of it. *9 Co. 26. 9 Ed. 4. 12. Bridgm. 132. Dyer 286. 34 H. 6. 9.*

Nul tel Record.

So to say, There is no such Record as the Plaintiff doth set forth. *9 H. 6. 26. 2 Cro. 32.*

So

So to shew, That 'twas done by *In pursuance of their Oath;*
Compulsion, in pursuance of their Oath; as Judges, Jurors, &c. 20 H.6.5. 1 Cro.

724,725. of a guid reuib als erdi
And if the Defendant have any of General Rule.
these, or such like things in his Case,
'twill be his wisdom to plead it Spe-
cially, and not to plead *Non Culp^r*.
Leon. 107.

But it will be no Plea to say, That the Plaintiff was guilty of the Felony whereof he was so Acquitted: Or, that one of the Defendants is dead since the Writ brought: Or, that the Record on which the Action is grounded, is, That the Plaintiff, and divers others besides him, were Indicted therein. 18 E.

4 I. 9 E. 4:23. o smol ind. alsd
But one may plead, That he had his Goods stoln, and found them in the Plaintiffs possession, and that he having other Causes to suspect him, complained to a Justice; who Bound-over the Plaintiff to Appear, and the Defendant to Prosecute. 2 Balstr. 284, 285. 2 Cro. 193.

See more of this in *March's* and *Sheppard's* Actions for *Slander*.

See also *Touchstone of Precedents*, Tit.

Words. *bepl* or *bepld* to *name* & *blame*
And *Townsend's Tables*. *bepl* or *bepld*
name & *blame* *book* or *tbl* *tbl*
name & *blame* *tbl* *tbl*

Bar in Trespass

Bar in Tres-

Non Culp,
when to be
pleaded.

There are divers things to be pleaded in avoidance of this Action, Speci-

ally, and in regard will relate to

And there is also the General Plea,

Not Guilty.

This General Plea may be pleaded in

these Cases, to wit,

1. When the Thing supposed to be

done, for Matter of Fact, is not
true.

2. When the Matter (as it is) is not a

Trespass, but some other Offence,
some other Action (and not Tres-
pass) given for it.

3. When the Lands or Goods, for
which the Action is brought, is
mine, and not the Plaintiffs.

See Co.5.83. Co.Lit.282,283.

General Rule.

If it be out of the Cases aforesaid,
and the Defendant have Matter of Ju-
stification or Excuse to plead, he must
be sure to plead it Specially; for in those
Cases, if he plead *Not Guilty*, it will be
found against him. *Co.us supr.*

If

If the Defendant Justify by Authority *Justification by Authority.*
(which may be given him either by the Law, or by the Party) to make his Justification good, there must be first a good Authority; and secondly, it must be well pursued.

In Trespass for Entry into Land, 'tis *Title to the Land pleaded.* a good Plea to make a good Title to the Land, or Common in it; and so for Goods.

See *New Book of Entries* in tot^o, Old Book of Entr. 565, 566, 567, 580,
590. 'Tis a good Plea to a Trespass, for an *Son Assault* Assault and Battery, to say, That the *demesne*. Plaintiff began. N. B. of Entr. 644. 34 H. 6. 16.

That he did it moderately, being a Schoolmaster, for Correction, &c. Old N.B. 555.

And to this Action for Imprisonment,
Assault or Battery;

That he did it as an Officer; *Justifies as Officer.*
That he did it by Necessity in Arrest, rest, to force Obedience, and the like; *By Arrest.*
see Old Book of Entries, fo. 560, 598, 599.

In Trespass, for taking a Horse, 'tis a *That he borrowed the Horse, &c.* good Plea to say, He borrowed it for a time, or for a purpose, which is not yet out, or done. Bro. Tresp. 337.

For

That the Plaintiff agreed, the Defendant should keep the Goods.

For taking of Goods, the Defendant may plead; That the Plaintiff left them in the Defendant's House; and after they Agreed, that the Defendant should keep them till the Plaintiff paid 10l. which he hath not paid him. 21 H. 7.

I 3.

That they were not the Plaintiff's Goods.

But 'tis not good to say, The Goods were the Goods of a Stranger, and not the Goods of the Plaintiff. 4 E. 4. 73. 3 H. 6. 32.

That he entred, to apprehend a Felon.

For Entry into an House, 'tis a good Plea to say, He entered to Apprehend a Felon, and took his Goods that were there. Old B. of Entr. 580.

Justifies as Bailiff of a Court-Leet.

Also for taking of Goods, he may plead, He did it by Warrant, as a Bailiff of a Court-Leet, for a Forfeiture. New Book of Ent. 663.

Or, he distrain'd for Rent or Service. Old Book of Entries 603, 604, 605.

By virtue of Process.

Or, that he took them by virtue of any Process out of a Court, enabled to make such Process. Old Book of Ent. 598, 599, 600.

Took them for an Hariot.

Or, that he took the Goods for a Hariot, Waif, Estray, Wreck, or the like. Idem 584.

Distrain'd them for Pawnage.

Or, that he distrained them for Pawnage, &c. Idem 599.

That they were Pledged to him, or to him that delivered them to the Defendant

Bars to Actions.

257

Defendant for Money not yet paid. *Idem*
598.

In Trespass for Entry into Land, Defendant
the Defendant may plead it was his
Freehold, or the Freehold of another,
from whom he had Authority to do
what he did. *Bro.ca.23,47. New Book of*
Ent.582,645.

So if it be for putting in of Cattel; *That the De-*
Defendant may plead, he hath right of
Common there, and under Colour
whereof he hath put in his Cattel. *Bro.*
Tresp.30.

If one have Corn upon anothers Land, and therefore Enter to take it, and the Owner of the Land sue him, he must Justify, and may not plead *Non* *Culp.* 5 Co.85.

So if he Justify by reason of a Rent charge. *Old Book of Ent.549.*

In Trespass for taking Cattel; it is a good Bar to set forth a good Sale to the Defendant, and that he thereby took them. *Bro.Tresp.328.*

So for cutting Trees; the Defendant may plead, That the Plaintiff gave them to the Defendant. *Idem 42.*

If it be for Cattle Damage feasant in the Ground; 'tis a good Plea to say, the Plaintiff did drive the Cattel into the Ground. *Idem 148. Kelyw.30.*

S.

In

*That he was
not his Ser-
vant.*

In Trespass, for Beating his Servant; Defendant may plead, That the party Beaten was not his Servant at that time.

*That the De-
fendant had a
Fishing there.
thereof he doth Fish.* Old Book of Entr,
596,605.

For Entry into a House; Defendant may plead, That it was a Common Inn, &c. Idem 594.

*Special Agree-
ment and Title* If one put in his Cattel into Land by Agreement with the Plaintiffs, he must plead it Specially. Idem.

And yet if he be to justify by reason of a Title to the Land, he may plead Not Guilty, and give the Special Matter in Evidence; and so in Detinue, Non definet, when the Goods are the Defendants. Co.Lit.283. 22 H.6.33. Vide ante.

*That the Plain-
tiff invited
him to receive
his Mony.* For Entry into a House, and taking Money away; he may plead, That the Plaintiff owed him the Mony, and he went into his House to receive it, being Invited by the Plaintiff. Old Book of Entr. 561.

*That he went
to fetch his
Cattle, which
were taken by
the Plaintiff.* For taking of Cattel; the Defendant may plead, That the Plaintiff had took away his Cattle, and he entred into the Clole where they were, and took them again. Idem 561,562,611,612.

That

That the Goods were the Goods of *That the Goods
J. S. delivered to the Plaintiff to keep, were a Stran-
and J. S. commanded the Defendant gers, who bid
to take them. Old Book of Entr. 556, them.
him to take them.*

557.

That the Plaintiff was Indebted to *That the Plain-
the Defendant, and gave him the Goods tiff gave the
in satisfaction of the Debt. Idem ibi- Goods for a
dem. Debt.*

That a Stranger took them away, *That the Owner
and gave them to J. S. and the right bid him keep
Owner commanded the Defendant to them.*
take them, as he did. *Id. 562.*

The Defendant in this Action hath *Defendant's
many Pleas by way of Excuse. As
advantage.*

For Entry into an House, taking of *License pleaded.*
Goods, &c. he may plead a License so to do from the Owner; as,

That he invited him into the *House:*

That he gave him leave to go through *To go through
his Close, &c. Bro. Tresp. 533. Co. Lit. his Close, &c.*

368.

But it must be a good License from *The License
him that may lawfully give it, and it must be good
and executed.*
a Tenant at Will, to cut down Trees,
is not good; nor from the Shepherd to
kill the Sheep. *Bro. Tresp. 194, 295.*

11 H.7.21. *Old Book of Entries 505, 596,
597.*

That the Cattel came through the Plaintiff's Mounds.

Trespass for the Defendant's Cattel Breaking the Plaintiffs Cloſe; the Defendant may plead, They came in through the Mounds of the Plaintiff, for want of ſufficient Repair.

But in this Case the Defendant must have ſome Interest into the adjoining Ground, as being Lessee for Years or at Will; or having Common; or having his Cattel right there to tack; or having leave to put his Cattel there.

The Cattel must go in of themselves.

But he muſt not put them firſt upon the Plaintiff's Ground, but where his Interēt is, and the Cattel muſt go in of themselves.

If he plead, there was no good Inclosure, he muſt ſhew, That the Owners (time out of Mind) did uſe to Incloſe it, and it will be a ſufficient Proof to maintain his Plea, that the Mounds were bad at the time, though it cannot be proved, that the Cattel went in through thole bad Mounds; for that shall be presumed, unſelſt the contrary appear. *Dyer 365. Bro. Trefp. I 36, 148, 192, 255, 345.*

But if the Beasts were turned in, the Plaintiff may ſhew it by his Replication. *Old N.B. 503, 563.*

General Rule.

If the man that ought to make the Hedge between him and me, go over it

it and break it down, so as my Cattel
get into his Ground, I may plead this
in Avoidance of his Action. *Fitz. 18 Fac. B.R.*

Arbitrament may be pleaded in Bar
of this Action. *Accord and Satisfaction*

*Arbitrament
pleaded.*

*Accord and
Satisfaction
pleaded.*

Also Accord with Satisfaction, and
it may be of a Bottle of Wine, or some
other thing, at the Charge of the De-
fendant. *Fitzb. Accord 1. 19 H. 6. 29.*
Fitz. Bar 26. And it must be fully fi-
nished and done before the Action
brought. *17 E. 4. 2. 6 H. 7. 10.*

And it must be in the Life-time of
him that did the wrong; and if it be
done by a Stranger, 'tis good, (*Dy. 356*)
if the party to whom the Wrong was
done did accept it, *9 Co. 79. Dyer 356.*
5 Ed. 4. 7.

And if the Trespass was by many,
and the Accord by but one, 'tis a good
Bar for the test. *9 Co. 79.*

That the Plaintiff hath a Replevin
depending in another Court for the
same Trespass, is a good Plea. *Bro. Tresp.
357.*

'Tis a good Plea to shew a Pardon
by Act of Parliament. *Old Book of Entr.
596.*

If the Action be for a Hurt, 'tis a
good Plea to say, The Plaintiff and
Defendant agreed to play at Back-
Sword, Foot-Ball, &c. and by that

*Agreement
pleaded.*

Bars to Actions.

Release plead-ed.

means the Hurt came. *Fitz.b. Nat. Br.*

244.

A Release is a good Bar; though the Trespass was by many, and the Release to one, 'tis good for all. *Hob. p. 96.*

Tender of A-mends pleaded.

Tender of Amends is a good Plea upon a Distress; it ought to be tendered before the Beasts are Impounded. *3 Co.*

76.

And upon a *Clausum fregit*, before the Action brought; but 'tis then best to disclaim Title, and plead it was by Negligence, or Involuntary. *Stat. 2 i Jac. 16. Trin. 3 Jac.B.R.*

See *Survey of the Law*, Tit. eod.

See also *Townsend's Tables*.

Non Culp' pleaded, and Property proved.

Defendant justifies it as Stray.
Dyer 306.
1 Cro. 146,
433, 434.
3 Co. 147.
1 Bulstr. 170.
3 Bulstr. 269,
289.

Note, If the Defendant to an Action of Trover plead *Non est Culpabilis*, the Plaintiff must prove his Property in the Goods.

If a man bring an Action of Trover for a Horse, or a Cow, or the like, the Defendant may Justify it as a Stray, and may chuse to deliver it, unless he be paid by the Owner for his Meat and Keeping, which he must plead Specifically.

See *Compleat Solicitor*, p. 222.

no So may an Hoster detain the Horse,
for Money for his Mear; and a Taylor
theo Garment until he be paided 4^l Co.
220^l AM smal oys not vnlawfull to
say I find my Goods in another mans
Custody, & I may bring my Action of
Trotter against him for them. in engl. but
Now, if he bought them in an open That he bought
Market, or in bany Fair, and they be them in Mar-
Toll'd in the Book, as the manner is, ket Overt.
this alters the Property, and the Goods
I can never recover; and this the De-
fendant must plead Specially.

But if he bought them privately any Property, when
bystoq where, not in an open Market or altered, and
Fair by this the Property is not when not.

ni a altered, and I may recover them.
So if my Plate be stolne, and I find Plate bought
it in another mans custody; if he bought privately.
it privately, and not in a Goldsmiths
Shop, the Property is not altered.

See 5 Cro. 83. 2 Inst. 7139 D. and Sect.

149. also two sib. of 149. 150. 151.

See also 2 Crl. 68. Telv. 178, 179. 180.

now, if he A is ob or not lawfull

In Trotter of Goods; the Defendant Sale in open
justifies by Sale in open Market, and Market.

Adjudged no Plea, because it amounts

only to the General Issue. 2 Cro. 165.

Not out distinguisht as to fact

and of the thing S 4. to conflict

To

*Another Action
depending.*

To an Action of *Treaser*, or Debt on Bond, it is a good Plea to say, there is another Action depending in the Courts of *Westminster* for the same Matter: But that there is an Action in an Inferior Court is not a good Plea, unless Judgment be given. § 26 r.

*Bar,
Colour given
in Tronier,
That the
Owner lost
them; That
a Stranger
found them, and
gave them to
the Plaintiff,
who lost them,
and the De-
fendant found
them, &c.*

The Defendant pleaded, That long time before the Conversion supposed to be y^r J. S. was possessed of these Goods (as of his own Goods) at B. in Norfolk; and that he (before the Conversion supposed) did casually lose them, and they came to the hand of J. P. by Trover, who gave them to the Plaintiff, who lost them in London; and the Defendant found them, and afterward did convert them to his own use by the Command of the said J. S. as was lawful for him to do: And it was moved, That this was no Plea; but amounts to the General Issue.

But all the Justices held it a good Plea; for it confesseth the Possession and Property in the Plaintiff.

plaintiff, against all but the lawful
true Owner. Note, This Plea was devised by Coke,
and alter the Trial of Cross (last
of the Publ.) 262. evill over boy said
boy not in good no fit A or so fit said
Vandrick and Archer, Mich. 32 & 33

Elizabeth

The Plaintiff declares, That where he himself was possessed of 27 Ells of Linnen Cloth, as of his own Goods, the same came to the hands of the Defendant by Trover, and he knowing them to be the Goods of the Plaintiff, sold them, and converted them, &c.

Trover for 27
Ells of Cloth.

The Defendant pleaded, That as to 24 Ells of the Linnen Cloth, long time before the losing, one C. was possessed thereof *ut de bona propria*, and sold them to the Defendant, who (before any Notice, that they were the Goods of the Plaintiff, and before any Request) sold them to others before Notice or Request. As to the Remainder, he was always ready to deliver them to the Plaintiff. And upon these Pleas the Plaintiff did Demur.

And it was Adjudged for the Plaintiff, upon the Insufficiency of the Plea.

Leon. Rep. pl. 34.

now bid or will call for.

If

15.

That the Horse in His hands find my Horse, and after was delivered to the Plaintiff before the Action brought. Ride him, and then delivers the Horse unto me, and I bring an Action of Trover for the Conversion : It is no Plea, that you have delivered the Horse to me before the Action brought ; for you ought to answer to the Conversion.

Per Popham

Vide Pract. Reg. 236: b Limkitt on P.

to all pr to believeth saw he mid cri

Ledesham and Labram, Hill. 44. Eliz.

B.R. to draw out of cause omitt all

That he delivered the Money Action upon a Trover of Ten Angels, and converting of them : The over, according to the Wager.

Wager betwixt the Plaintiff and one C. concerning the quantity of Yards of Velvet in a Cloak; and the Plaintiff and the said C. each of them delivered into his hands Ten Angels; and each of them agreed, That if there were 12 Yards of Velvet in the Cloak, that then they should be delivered to the said C. which is the same Conversion.

And it was thereupon Demurred.

And Gandy held the Plea good enough, for the measuring thereof is the fittest way for the trying it, and when it is so found by the measuring, he hath good Cause to deliver them out of his hands to him who had won the Wager.

But

Demarter,

But Popham and Fanner held, That the Plea was not good ; for it may be that the Measuring was false, and therefore he ought to have averred in Facto, that there were 12 Yards, and that it was so found upon the measuring thereof.

But because he might have pleaded the General Issue, and given all the Matter in Evidence, Judgment was given for the Plaintiff. 1 Cro. 870. An Action of *Trever* brought for two Steers :

The Defendant being an Attorney of the Common-Pleas, Justifies the Taking as Under-Sheriff, by reason of Process from the Exchequer, to levy of the Occupiers of the Land of divers persons in a Schedule, in the said Writ named, the Debts therein specified, and doth not recite the Schedule ; and he being Under-Sheriff, took the Steers in the Land of the Plaintiff, (which was lately one *Stone*, who was Debtor to the King in 59.) being behind upon the Land. Exception was taken, for that it was not directly alledged, That the Land such a day was the Land of the said *S.*

The

The Writ commanded to levy the Sums in the said Schedule mentioned; and if they would not, to take their Bodies. And it was Adjudged a good Warrant to levy of the Occupiers of the Lands that were the said S's; § 99. but of

Vide ante, Tit. Detinue, p. 238.

General Rule. If the Defendant admits a Property in the Plaintiff, he may plead any Special Matter to oust him of it, or to justify what he hath done: And if no Demurrer with Cause shewn, that it amounts to the General Issue, it is for him to prove his Title by the

3 Cro. Comyns versus Boyer, 485. Trover for Oxen.

Defendant pleaded a Sale by a Stranger in Market-Overt.

Plaintiff demurr'd generally, and so Adjudged for the Defendant.

Causes must be shewn, &c. or non est.

Executor brings an Action of Trover of Goods; the Defendant pleads, That the same Executor had released him.

The Plaintiff Replies, That he was within Age, at the time of making the Release: And Adjudged the Release was no Bar. 3 Cro. 27. 1 Cro. 490. Mo. 146.

1 And. 177. 3 Cro. 67 1. 1 Rot. 730.

To this the Plaintiff replies, That he was not within Age, at the time of making the Release.

2 Bell off. For

That the Executor released him.

For the Pleadings about this, see *Autorities.*

Dyer 121, 146, 174, 252, 263. 1 Cro. last

Publ. 35 1, 352, 378, 433, 434, 435, 480,

486, 505, 540, 551, 568, 569, 693, 763,

870, 883, 901. 2 Cro. 68, 69, 256, 219.

Cent. 8. Case 45. 21 H. 6. f. 2. 30 H. 6. 7.

31 H. 7. 7. 13 H. 7. 21. 5 E. 4. 136. 243.

45, 67, 198. *Noy's Rep.* 41. *Brow.* and

Goldb. 5. *W. W.* 11. *W. W.* 11.

No Traverse may be of a Consideration executed alone, but a Consideration Executory may be traversed alone. 1 Cro. 201, 258, 373. + *W. W.* 2.

In Trover and Conversion, the Conversion is traversable; and therefore

*Conversion
traversable.*

Time and Place of a Conversion must

be set down in Pleading. 1 Cro. 97, 281,

585. *W. W.* 11. *W. W.* 11.

Where a Justification in Trover is

set upon Sale, there needs no Traverse

of any more than the Place alledged,

and not the whole County; but if it

be Transitory, as for taking of Goods,

and the like, there the whole County

must be traversed. *Brow.* & *Goldb.* 17.

See *Townsend's Tables.*

W. W. 11. *W. W.* 11.

Nul Waste **Bar in Waste.**

*Nul Waste
fait.*

The General Plea to this Action is *Nul Waste fait.*

The Special Pleas are many, either by way of Justification or Excuse, as the Case may require.

*That it was
Repair'd before
the Action
brought.*

If the Waste be laid to be in, not Repairing, 'tis a good Plea, That it was Repair'd before the Action brought: And this must be pleaded Specially.

5 Co. 119. 4 Co. 11, 64, 840 & 35 H. 4.

*That the Lessor
gave Authority.*

But 'tis no Plea to say, 'twas Repair'd after the Action was brought.

Idem.

The Defendant may plead, That the Lessor gave Authority to do the Waste.

*That the House
was burnt.*

Kelw. 37. Bro. Done 33. It is a good Plea to say, The House or Trees were burnt, or spoiled with Fire, Water, or Wind, or were ruin'd by some extraordinary Act of God.

Bro. Waste 31. 4 Co. 64.

House fell.

To say that the House fell before the Lease:

Surrender.

Or, that the Lease is Surrendred to the Lessor, and he accepted it.

*Plaintiff hath
entered.*

Or, that the Plaintiff hath entred upon the Land, and before his Entry there was no Waste done.

Or,

Or, that the Plaintiff himself did the Warte. *The Plaintiff did the Warte.*

Or, that the House was so decay'd at the time of the Lease, that it could not be upheld. *That it could not be upheld.*

Or, that the House fell with Tempest &c. *That it fell with Tempest.*

Or, that the Plaintiff hath granted away his Estate, and before the Grant there was no Warte done. *The Plaintiff hath granted away his Estate.*

Or, that the Plaintiff hath by good Release words released it.

Or, that the Lease was made without Impeachment of Warte. *That the Lease was made without Impeachment of Warte.*

These or the like are good Pleas in Warte. 12 H. 4. 6. 8 H. 5. 8. Bro. *Waste 18, 29, 33, 54. See Finch's Ley 55.*

But tis no good Plea for the Defendant to say, He had nothing in the Land at the time of the Warte done. *Bro. Waste 22.*

'Tis no good Plea in this Action, for cutting down Timber, or pulling down the House— : That the Lessor took away the Timber or Materials. 4 Ca. I. 48, 64.

Nor that the Lessor hath a Covenant from the Lessee, not to do Warte. *Mich. hath a Covenant from the Lessee.*

Neither

*That he keeps
the Timber
till there shall
be need.*

Neither is it a good Plea in this Action for cutting Timber, if the Tenant say, That he cut it, and keeps it till there be need. *Mich. 39 & 40 Eliz. Com. Ban. Gorges versus Stanfield.*

*That he cut it,
and hath em-
ployed it, &c.*

Nor to say, He cut for necessary Reparations, unless he say withal, That he employed it to that purpose. *Dyer 322.*

And yet no doubt it may be justified, to cut it a little before it be used, when an occasion is apparent.

*That he made
Posts to par-
t Inclosures.*

Yet it is a good Plea to say, He cut it to make Posts to part inclosures, if he can prescribe, that there have been always such an Inclosure there. *M. 1612.*

*What may be
given in Evi-
dence.*

And in all these Cases, upon the General Issue, the Defendant may give in Evidence any thing that is no Waste; as by Enemies, Tempest, Lightning, or the like.

But he cannot give in Evidence justifiable Waste; as to Repair the House, or the like.

Nor that which is in Excuse, as that he Repair'd it before the Action brought, &c. *Dyer 212, 276. Co. Lit. 283, 12 H. 8. i. 29 E. 3. Waste 30.*

See Townsend's Tables,

C H A P T E R VII.

Concerning Pleas in Abatement, with
Rules and Precedents for the same.

Every Plea must be pleaded either in Bar to the Action brought, or in Abatement of the Writ upon which the Action is brought, &c.

If the Defendant begin his Plea in Bar, and conclude it in Abatement, and the Plaintiff do demur thereupon, Judgment final shall be given against the Defendant, *Trin. 25 Car. 2. in B. R. Forth and Cole, vide Mo. 692.*

*Def. dit Actio non, Et Quer^r reply Cas-
sari non, Et bone per Cur^r.*

Note, it is said, That when the Defendant pleads in Abatement for Matter apparent in the Writ, he shall commence his Plea so : *Petit Judic^r de brevi, &c.* and shall conclude in the same manner, *Mo. 30.*

But if for Matter out of the Writ, as *Excommunication, &c.* he shall make the Conclusion so, and not the beginning.

*Unde pet^r Judicium, Et quod ob Causam
predict^r Billa pred. cassetur, &c. Idem.*

T

If

Pleas in Abatement.

If upon such a Plea the Parties go to Issue, and it be found against the Defendant, it is Peremptory, and he shall lose the Land, &c.

But upon a Demurrer it is not so; but a *Respond' Ouster*. *Yelv. 112.*

*The Defendants
ought to give
the Plaintiff a
better Writ.*

When a Man pleads in Abatement, he ought always to give the Plaintiff a better Writ; as in Ejectment for 40 Acres of Land in S.

Defendant pleads, That in S. there are three *Vills*, viz. A. B. C. And because the Plaintiff does not shew in which of the *Vills* the Land lies, demands Judgment.

And the Plea was Adjudged ill, because after Impariment, and he does not shew in which of the *Vills* the Land lies, *Yelv. 112.*

*The Plaintiff
made a Knight
after the last
Continuance.*

If the Plaintiff, after the last Continuance be made a Knight or Baronet, it seems the Plea shall not Abate, *1 Cro. 104, 371. 1 Ed. 6. ca. 7. 6 Co. 27 Hob. 129.*

*Two Actions
depending one
on another.*

Where two Actions (though of several Natures) depend one upon the other, the Abatement of one, is Abatement of both, *Pract. Reg. p. 5.*

The

The Causes of Abatement of a Writ *The Causes of
Or Plaintiff, are either, Abatement.*

1. By Act of God, as where the Plaintiff or Defendant are dead.
2. Or by Act of the Party ; as when there appeareth in the Writ, or Declaration, or both, want of sufficient and good Matter.
3. Or when (though it be good,) yet it is not certainly alledged.
4. Or the Name of the Plaintiff, or Defendant, or Place is mistaken.
5. Or there be Variance between the Writ, Specialty, or Record.
6. Or apparent Repugnancy.
7. Or Incertainty in the Writ, Count,
8. Or Declaration, 18 Ed. 3. 27.

But if the Defendant doth first plead a Plea, that doth tend to the destruction of the Action for ever ; he shall not be admitted after to plead in Abatement of the Writ ; and yet if there appear Matter apparent in the Record, for which the Writ ought to be abated, then the Defendant may shew it to the Court in Arrest of Judgment, Co. Lit. 277. 6 Co. 64. 8 Co. 61. 9 Co. 53. 18 Ed. 3. 27.

Several Precedents in Abatements.

For Variance between the Writ and Register.

¶ In Quare Impedit Def. ven' & pet' auditum Brevis Origin'. Et ei legitur in hec verba (Rex, &c.) Quo lecto & audito pet' Judicium de Brevi illo quia dic', Quod breve illud non concordat cum forma Brevis in Registro in hujusmodi Casu edit' & provis. Quia dic' quod idem breve caret hoc verbo [Injuste] Et hoc, &c.

¶ Aliter.

¶ Et pred. Def. per C. A. At' suum ven'. Et pet' audit' pred. Brevis Originalis predict' Quer', & ei legitur in hec verba (Recite the Original). Quo lecto & audi-
to idem Def. petit Judicium de Brevi
pred' quia die' quod Breve illud malum
& vitioum existit, & non impetrat' per-
sus eund' Def. secundum cursum & for-
mam Registri & Brevium Originalium in
hac parte provis. Quia dic' quod idem
breve impetrat' est per hec verba sequen',
viz. Pr' R. B. Quod juste & sine dilatione
reddat T. B. un' Messuagium & dimidium
virgat' Terre cum pertinen' in M. ubi
secundum cursum & formam Registri pred.
terra

terra petet^r per certitudinem acraru^m
terre, & non per iucertitudinem Virgat^r
terre prout breve illud impetratur, Et hoc
parat^r esti verificare, Unde ex quo breve
illud in forma predict^r impetrat^r vitiosum
est. Idem Def. pet^r Judic^r de Brevi illo,
&c.

Aliter.

¶. Et pred^r Tenens per A. B. Attorn^r
suum ven^r & dic^r quod in quolibet brevi
Original^r de ingressu, &c. impetrat^r per
Registrum talis debeat inseri Clausula,
viz. (Et unde Queritur, Quod tenens ei
deforc^r, &c.) Et quia Clausula illa in
Brevis pred. omnino est omissa pet^r Judic^r
de Brevi illo, &c. Ideo Cons. est quod
predict^r petens nichil capiat per breve su-
um pred^r, Set sit in Misericordia pro
falso clamore suo. Et predict^r tenens eat
inde sine die, &c.

For Variance between the Writ and Declaration.

Quo lecto & audit^r idem Def. pet^r
Judicium de brevis ill^r, Quia dic^r quod
babetur variac^r int^r breve pred. & Narr^r
super idem breve declarat^r id hoc (viz.)
Quod predict^r Quer^r in brevi pred^r nomi-
natur per nomen M. S. Et in Narr^r pred^r

Pleas in Abatement.

super brevi illo fundat^r eadem Quer^r nominatur per nomen N. S. Unde ex quo habetur variac^r int^r Breve & Narr^r pred. in nomine ipsius Quer^r, Idem Def. de brevi illo pet^r Judic^r, (&c.)

Aliter.

Et predict^r A. B. per C. D. Attorn^r suum ven^r & defen^r vim & injur^r quando, &c.
Et pet^r auditum brevis Original^r super quo pred^r E. F. superius versus eum narravit,
Et ei legitur in hoc verba Guilielmus (&c.
as in the Writ, verbatim,) Quo lecto &
audito, Idem A. B. petit Judic^r de brevi
& Narr^r pred. quia dic^r, Quod habetur
material^r Variac^r, inter Breve pred. &
Narr^r pred. prout Cur^r hic manifeste liquet
& apparet, Et hoc parat^r est verificare,
Unde pet^r Judic^r de brevi & Narr^r ill^r,
&c.

J. Tremayne.

Variance between the Writ and Specialty.

ss. Et modo ven^r tam predict^r T. quam
predict^r J. in propr^r personis suis, Et quia
predict^r T. in quodam scripto Obligatorio
versus prefat^r J. hic in Cur^r prolat^r per
quod scriptum pred^r J. tenetur pred^r T.
in pred. Cent^r libr^r certo termino in eod^r
scripto

scripto content³ solvend³ nominatur & vocatur per nomen T. K. de Lond³ Mercer³ & in brevi predict³ idem T. nominatur & vocatur per nomen T. H. &c. Sicque Variac³ existit int³ pred³ Breve & dictum scriptum Obligatorium super quo scripto Breve pred³ fuit impetrat³, Ideo Cons. est quod pred. Tho. nichil capiat per breve suum predict³, Set sit in Misericordia, &c. pro falso clamore suo, Et pred. J. eat inde sine die, &c. Et quod Litere Domini Regis de pardonatione Patentes de Utlagaria in ipsum J. occasione premissis promulgat³ prefat³ J. allocentur, &c.

Nota, Utlary in the Plaintiff is no Plea, where the Plaintiff sues in *auter droit*, as Executor, &c. 21 E.4.49. 34 H. 6. 14. 14 H. 6. 14.

Aliter after Oyer.

ff. Quibus lectis & auditis, Idem Def. dic³ quod breve pred³ varians est a scripto pred³ eo quod idem Def. in eod³ scripto nominatur Johannes C. Jun³ de Nova Sarum, que dictiones (Jun³ de Nova) omissa sunt in breve pred³, Sicque Breve illud non warrantizatur per script³ pred. per quod idem Def. pet³ Judic³ de Brevi illo, &c.

Variance between the Writ and Testament.

ff. *I Debito per Exec³, Def. dic' Quod pred. Testator, &c. in Brevi pred³ nominatur T. G. nuper de Dundre, Et in Testament³ pred. nominatur T. Drodryne de Parochia de Dundre, sicque beve pred³ Varians est a Testamento pred³, Et inde minime Warrantizatur, Per quod pet³ Judicium de brevi, &c. Et super hoc visis per Cur³ tam Brevi quam Test³ pred³, Exceptio pred³ comperta est vera, Ideo Cons. est, quod pred. Quer³ nichil capiat per Breve suum pred³, Set sit in Misericordia pro falso clamore suo, Et pred³ Def. eat inde sine die, &c.*

Judgment for Insufficiency of the Original.

Et quia audito brevi pred. & plenius intellecto videtur Cur³ hic Breve illud plur³ de Causis fore insufficiens & cassabile in lege Cons. est quod pred. Quer³ nichil capiat per breve suum, Set sit in Misericordia pro falso Clamore suo, Et quod pred³ Def. eat inde sine die, &c.

Variance

Variance between the Original and
Specialty.

ff. Et pred. Def. per A. B. Attorn' suum
ven', Et per' Judic' do Brevi predict',
Quia dic', quod habetur Variantia int'
scriptum predict' hic in Cur' prolat' &
breve Origin' super eod' scripto impetrat',
quia dic' quod ipse idem Def. per Scrip-
tum illud nominatur & vocatur R. B. de
F. Et hoc parat' est verificare, Unde ex
quo habetur Varianc' int' breve predict',
& scriptum pred' super quo breve predict'
impetrat' fuit per' Judic' de brevi illa,
&c.

The like after Oyer.

ff. Quibus lectis & auditis, idem Def.
petit Judicium de brevi predict', Quia dic'
quod ipse in predict' scripto Obligator³ super
quo breve pred' impetrat' fuit nominatur &
vocatur per nomen J. G. de S. in Com' N.
Clerici, Et in brevi predict', idem J. no-
minatur & vocatur per nomem G. G. de
B. in Com' S. Clerici, Sicque manifesta
Varianc' existit int' breve & pred' scrip-
tus Obligator³ super quo breve illo impe-
trat' fuit, Et hoc, &c. Unde, &c.

ff. Et

For Mariane ss. Et predict^o Def. per T. S. Attorn^y su-
int^t Querel^t & um ven^t & defend^t vim & injur^t quando,
Narr.^t Et pet^t Auditum de Querela predict^t,
& ei legitur in hec verba, ss. T. B. Que-
ritur de R. M. (&c.) de placito quod red-
dat ei 10 l. quas (&c.) Et sunt pleg^t de
prof. (&c. ut in Querel^t) Qua lecta & au-
dita idem Def. pet^t Judic^t de Narr^t pre-
dict^t, quia dic^t quod int^t Querel^t & Narr^t
pred^t habetur materialis Variac^t prout Cur-
bic appetet, Et hoc (&c.) Unde ob Vari-
ationem illam idem Def. pet^t Judicium de
Narr^t predict^t, &c.

Edm. Saunders.

The Variante.

Note, The Variance was, for that
the Plaintiff declared for 50 l. when the
Debt per Querel^t was 10 l.

For that the
Plaintiff de-
clares of seve-
ral and distinct
Causes of Abi-
on in one and
the same Bill.

Et predict^o Def. per T. S. Attorn^y suum
ven^t & defend^t vim & injur^t quando, &c.
Et petit Judicium de Billa predict^t. modo
versus eum exhibit^t, Quia dic^t quod per
eandem Billam appetet, Quod pred^t Quer^t
queritur de separal^t & distinct^t Causis
Action^t, Ubi per Legem Terre idem Quer^t
pro eisdem Causis Action^t separales Billas
respective exhibere debuisset, & non unam
Billam solummodo pro omnibus Causis
Action^t pred^t insimul, Et hoc idem Def.
parat^t est verificare, Unde ex quo idem
Quer^t plures Causas Action^t in una eadens-
que

que Billia non conjungendas superius con-
junctit; Idem Def. per Judic' de eadem
Bill', &c.

Edm. Saunders.

Et predict' Def. presens hic in Cur' in For that the
prop' person' sua defend' vim & injur' Plaintiff de-
quando, &c. Et petit Judicium de Bill' clares of two
pred. modo versus eum exhibit', Quia dic' several Tres-
quod per eand' Billam appetet quod pred' passes depend-
Quer' queritur de duabus separal' & di- ing upon two
stinct' Trans. pendeb' super duos separal' in one and the
Titulos ad duo separal' & distinct' Officia, same Bill.
Ubi predict' Quer' pro eisdem Transgr'
duas billas respective exhibere debuisse,
& non unam Billam solummodo pro am-
bus Causis Action' predict' insimul, Et
hoc parat' est verificare, Unde ex quo idem
Quer' duas Causas Action' in una eadem
que Billia non conjungend' superius conjunxit,
Idem Def. petit Judicium de eadem Billia,
&c.

Edm. Saunders.

Et predict' J. C. per J. G. Attorn' suum That the Bill
ven' & defend' vim & injur' quando, &c. is in case, and
Et pet' Judic' de Bill' pred', quia dic' quod ought to be in
per Bill' pred. appetet, Quod pred. J. C. Account.
onerabil' existit virtute promiss. & Ass. in
dicta Bill' mnc' in Placito Comp' ut bal-
livus ejusdem J. P. Sen', Et pro eo quod Bill'
pred'

pred. est in placito Transgr^r super Casum
predict^r T. petit Judic^r de Bill^r predict^r,
Et quod Bill^r ill^r cassetur.

J. Holt.

In Appeal of Murder: Def. per' audi-
dium Brevi^r Original^r, Et ei legitur,
per' etiam auditum return^r, (which was
Quod Vic^r Astach^r fuisse Def. per Corpus
suum; sed he was removed by a Habeas
Corpus into the King-Bench, Ita quod
Corpus suum ad diem Return^r brevis pred'
babere non potuit.)

For misnaming the Parish. Quibus lectis & auditis idem Geo.
Ward per — Attorn^r suum defend.
vim & injur^r quando, &c. Et omnem Fel-
lon^r, Et quicquid, &c. Et petit Judicium
de brevi Original^r pred' quia dic^r quod ipse
idem G. W. per breve illud appellat^r ex-
istit per nomen Geo. Ward nuper de Pa-
roch^r Sancti Jacobi Westm^r in Comitatu^r
Midd^r Gen^r, ubi revera & in facto infra
Com^r Midd^r predict^r est quedam Paroch^r
vocat^r & cogn^r per nomen (Paroch^r Sancti
Jacobi infra Libertat^r Westm^r) sed in
eodem Com^r Midd^r non habetur nec die
imperac^r brevis Original^r Apelli predict^r
seu unquam habebatur aliqua Paroch^r Villa
sive locus cogn^r & nuncupat^r per nomen
(Paroch^r Sancti Jacobi Westm^r) tantum
prout predict^r Eliz. per breve suum pred'
superius suppon^r, Et hoc ipse idem G. parat^r
est

est verificare, Unde pet' Judic' de Brevi
illo, Et quod breve preditt' casseretur, &c.

T' h'abnq' in ha' d'f' Hen. Pollexfen.

Ag' Qua' u'ra & Samp. Ward.

Et predict' Eliz. O. (Demurred Gene-
rally to the Riccas in Abatement) Et hoc'
&c. Unde pro defectu sufficien' respons' in
ha' parte, Eadem Eliz. petit Judicium ver-
fus predict' G.W. de & Super premiss. Et
quid breve illud adjudicaretur bonum.

Et predict' G.W. &c. ad cassand' breve

(&c. ut imaki Rejunc') Et quod breve ill'
casseretur, &c. all' allen & quod

& mali' art' u'ral Samp. Ward.

Et predict' G.W. &c. ad cassand' breve

(&c. ut imaki Rejunc') Et quod breve ill'
casseretur, &c. all' allen & quod

adn' Debito versas J.B. de T. in Com' pred' For not distin-

Yeoman. Vill' there being

Defendit' quod in Com' preditt' due ba' Vill' there being
ben'or Villa vocat' T. & neutra earum sine two of one
Additione nec in Com' preditt' unquam ba' Name, and ei-

bebatur talis Villa vocat' T. tantum prout had an Addi-

pred. Quer' per breve suum preditt' super- tion.

rius suppon'. Et hoc, &c. Unde petit Ju-

dicium de brevi illo, &c.

Et Quer' manuteneret breve, &c. Ideo xii.
de corpore Com', &c. per quos, &c.

Robertus

Robertus W. de J. in Com' predict' Husbandman, attach'd fuit ad respondend' T. B. de placito quare Vi & armis Claus. ipsius T. apud A. fregit, &c.

For that the Defendant is named of J. which is a place in E. and no Vill nor Hamlet, nor place extra Vill' & Hamlet.

Expedit' R.W. de Epping in Comitatu pred. Husbandman, in proprio persona sua die quod ipse die impecrat' brevis predict' fuit commorans & conversans apud Villam de Epping in Com' predict', & est in eadem persona versus quam pred. Tho. per nomen R. W. de J. iulit breve suum predict', Et defend' vim & injur' quando, &c. Et dic' quod pred. Locus vob' J. in predict' Villa de Epping est nulla Villa per se sed Hamleitus neque locus extra Villam & Hamlertum, Et hoc paratus est verificare, In quo Casa idem R. in brevi predict' nominari debuisse de pred. Villa de Epping, Unde cum sic non nominatur secundum formam Statuti de Cognitionibus cognacionum in Brevib' super quibus processu Utigatio jacet imponenda petit Judicium de brevi predict', &c. T. iulit breve suum predict'

Et Quer' pet' L. lo' min

Pro non Com-
moranc'.

Def. dic' quod ipse die impecrat' brevis predict' fuit Commorans & Conversans apud B. in Com' S. Absque hoc quod ipse unquam fuit Commorans seu Conversans apud

apud B. predict. prout per breve predict' supponitur, Et hoc, &c. Unde pet' Judicium de brevi ill', &c.

*Quer' moratur in Lege. Et Judic' Quod Respond' ouster agard.
Def. respond' ulterius, &c.*

In Transgr' apud R. & C.

*Def. dic' quod Locus vocat' C. est infra For that C. it
pred. Vill' de R. Et parcel' ejusdem Vill', parcel of the
Et hoc, &c. Vill' de R.*

*Et Quer' denegat placitum prout Def.
superius allegavit, Et hoc pet', &c.*

*Et predict' Johannes per M. P. Attorn' For that the
suum ven' & pet' auditum pred. brevium Plaintiff was
de Scire fac' versus eum impetrat', Et ei ne Baronet, but
leguntur, &c. Quibus lectis & auditis idem
J. S. pet' Judicium de Brevibus ill', Quia
dic' quod ipse idem Jo. die emanac' pred'
Brevis de Scire Fac' non fuit Baronettus
prout per brev' predict' superius supponitur.
Et hoc parat' est verificare, Unde ex quo
pred. J. S. per pred' primum breve nomina-
tur Miles & Baronettus, Idem J. pet' Ju-
dicium de brevibus, pred', &c.*

Edm. Saunders.

Et

In Debt, where Et predict^r Tenens dic^r, Quod predict^r
 the Demandant petens est Miles, & fuit die impetrac^r
 us made Knight. brevis predict^r, unde ex quo idem petens
 non nominatur Miles in brevi predict^r,
 Idem Tenens pet^r Judicium de brevi illo,
 &c.

Simile per Bar^r
 & Ux^r del En-
 dowment J. F.
 quondam viri
 sui.

Et predict^r Tenens dic^r, Quod pred. J. F.
 super Vir, &c. du^r antequam diem suum
 clausisset extre^rnum fuit insign^r Miles —
 Et hoc, &c. Unde pet^r Judicium de brevi
 pred^r, &c. — Et Quer^r hoc non dedic^r per
 quod breve casserat.

Defendant Et predict^r W. S. in propr^r persona sua
 pleads, that uen^r, Et dic^r quod ipse est eadem persona
 he is misnamed versus quam predict^r Quer^r tulit breve
 in the Writ. suum predict^r per nomen W. S. Et defend.
 um & injur^r quando, &c. Et dic^r, Quod
 ipse vocatur & cognoscitur per nomen W.
 Spechell, & non per nomen W. Speciell
 prout per breve pred^r supponitur, Et hoc
 parat^r est verificare, Unde pet^r Judic^r de
 breve pred^r, &c.

Repl^r adinde.

Et predict^r Quer^r dic^r, Quod breve suum
 predict^r ratione preallegat^r cassari non
 debet, Quia dic^r quod pred^r W. Spechell
 qui modo comparet, &c. est eadem per-
 sona versus quam ipse tulit breve suum
 predict^r & vocatur & cognoscitur, tam
 per nomen W. Spechell, quam per nomen
 W. Spe-

W. Speciell, Et hoc per' quod inquiratur
per Patriam, Et predict' W. Spechell qui
in brevi pred' nominatur W. Speciell, si-
milit, &c.

Et predict' E. & quedam E. Ux' ejus For that the
in prop' person' sua ven', Et dic', quod wife of the
predict' E. per Vic' Com' pred' summon' Defendant is
suit per nomen A. Ux' ejusdem E. prout misnamed.
per breve pred' supponitur, Et hoc, &c.
Unde ex quo pred' E. in brevi predist'
superius Spec' nominatur A. & non E.
idem E. & E. per' Judicium de brevi
illo, &c.

Et predict' tenens per A. B. Attorn' suum For that the
venit & dic', quod ubi per breve pred' Name of the
supponitur Mess. & Shopas predict' dat' Wife is put
fuisse prefat' Agneta filie Johannis in before the Hus-
liberum Maritagum cum pred' Willielmo
filio Richardi faciend' per idem breve
dicendum de ipsis Agneta & Willielmo
anteponend' nomen Uxoris ante nomen
viri ubi per formam, &c. nomen viri ante-
ponere debuit nom' Uxoris per quod pra-
defectu forme pet' Judicium de brevi,
&c.

Et predict' Quer' non dedicendo Excep- Plaintiff pur-
tionem pred' ex causa illa, & aliis in chases another
brevi pred. content' pet' Licentiam que- VVrit by—
rendi melius breve, Et habuit, &c. Ideo
Cons. est quod predict' Quer' nihil capiat

per breve suum pred', Set fit in Misericordia pro falso clamore suo, &c.

For that the Defendant was ven' & pet' Judicium de Bill' pred', Quia Married at the time of the Bill exhibited.

ff. Et predict' E. per A. B. Attorn' suum dic' quod ipsa tempore exhibition' Bille pred' fuit cooperta de quodam C. B. Viro suo, qui quidem C. B. adbuc superstes, & in plena vita existit, Videlicet apud F. in Com' M. Unde ex quo pred' C. non nominatur in Billa pred' eadem E. pet' Judicium de Billa pred', Et quod Billa ill' cassetur, &c.

For that the Defendant was ven' & defend' vim & injur' quando, &c.
Married at the Day of the Writ.

ff. Et pet' Judicium de brevi illo, Quia dic' quod ipsa eadem Def. die impetrac' brevis Original' ipsius Quer' pred. cooperta fuit de quodam J. W. Viro suo, videlicet apud W. pred', Et hoc parat' est verificare, Unde ex quo idem J. W. non nominatur in brevi pred' eadem Def. pet' Judicium de brevi illo, &c.

Rep' and Issue thereon.

Et predict' T. dic', quod breve suum pred' ratione preallegat' cassari non debet, quia dic', Quod eadem D. die impetrac' brevis Original' ipsius T. scilicet (tali die & Anno) non cooperta fuit de pred' J. W. Viro suo, prout pred' D. superius allegavit, Et hoc pet' quod inquiratur per Patriam, Et pred' D. similit', &c.

Et

Et pred' Def. per A. B. Attorn^y suum For omitting a
ven^t & dic^t, quod in brevi predict^r Quer^r Word in the
facta est omisso hujus dictionis (Per) int^r Writ.
ipso J.H. & L.M. per quod breve predict^r
defectivum & insufficiens est in se, Unde
pet^r Judicium de brevi illo, &c.

Et quia Except^r pred' Justic^r hic per in-
spectionem ejusdem brevis manifesta est &
vera. Ideo Cons. est quod pred. Quer^r nichil
capiat per breve suum pred^r, Set sit in
Misericordia pro falso clamore, &c.

In Debito pro Administrat^r, &c.

Def. pet^r Judicium de brevi, quia dic^t, simile
quod in pred' Literis Official^r pred^r conti-
netur quod Administrac^r omnium bonorum
& Catalogorum W. C. alias P. apud Lon-
don^r prefat^r, Quer^r commissa fuit, Et in
brevi pred^r sit emissio de pred^r verbis (alias
P.) per quod breve pred^r non expressat quin
pred. W. in brevi predict^r nominat^r & pred^r
W. in pred^r Literis nominat^r diverse pos-
sunt esse persone, Unde petit^r Judic^r de bre-
vi pred^r, &c.

Et quia pred^r Quer^r exceptionem pred.
(que per inspectionem & collectionem Bre-
vis & Literarum pred. Cur^r hic satis li-
quet) non dedic^r Ideo Cons. est, Quod pred^r
Quer^r nichil capiat per breve suum pred^r,
Set sit in Misericordia pro falso clamore suo,
Et quod pred^r Def. eat inde sine die, &c.

Et super hoc visis per Cur' tam Brevis quam Testament' pred' dicta Exceptio competit est vera, Ideo Cons. est, &c.

For false and incongruous Latin.

In brevi de Ingressu ad Communem Legem Tenens pet' Quod breve cassetur pro incongruo Latino & cassat' fuit.

Et in Formedon Breve cassetur pro falso Latino, videlicet, Et que post mortem predicti T. & A. Whereas it should have been, Post mortem predictorum T. & A. &c.

Property in a Stranger.

Et predict' T. T. per A. B. Attorn' suum ven' ex defend' vim & injur' quando, &c. Et pet' Judic' de pred' Brevi, Quia dic', Quod proprietas predict' triuno Vaccarum in Narr' pred' superius spec' predicto tempore, quo, &c. fuit cuidam C. D. Absque hoc, Quod proprietas illarum Vaccarum eodem tempore, quo, &c. fuit prefat E. F. prout per breve pred' superius supponitur, Et hoc parae est verificare, Unde petit Judic' de brevi illo, &c.

North versus Wildman, Replevin,
Quare cepit averia;
Defendant pleads, the property of
the Goods were in him, and not in
the Plaintiff. H. Rollexfen.
Plaintiff demurs, because it ought to
be pleaded in Abatement.

E. Saunders.

Def.

Def. jung' in morac', Et Judic' pro Def.
It may be pleaded either way.

Et predict' B. per C. D. Attorn' suum That one of the
ven', Et dicit, Quod ipse in nullo est Culp' Defendants
de Transgr' pred' prout pred' Quer' superius died before the
versus eum queritur, pro placito dicit, Quod
predict' A. un' Def. mortuus est & obiit ante
diem impetrac' brevis predict', Quer' pred'
videlicet, apud M. in Com' pred', Et hoc
Parat' est verificare, Unde pet' Judic' de
breve pred', &c.

quam modo loco nomine Com' etiam.

Et predict' Quer' dic', quod breve suum Repl' and Issue
pred' ratione preallegat' cassari non debet,
Quia dic', quod pred' A. die impetrat' bre
vis pred', scilicet (Tali die & Anno, &c.)
superstes & in plena vita fuit apud M.
pred' & non mortuus prout pred' Def. sup
rius allegavit, Et hoc per quodd' inquiratur
per Patriam, &c.

Et predict' A.B. per C. D. Attorn' suum That the Plain
ven' & defend' vim & injur' quando, &c. tiff died after
Et dic', quod post ult' Continuationem brevis the Darcin
pred', scilicet xv. Hill. ult' preterit' de qua
processus fuit continuat' hic usque ad hunc
diem, scilicet xv. Pasch. & ante hanc Quint
den.Pasch. pred' Quer' mortuus est, Videlicet
apud K. in Com' S. Et hoc parat' est veri
ficare, Unde pet' Judic' de brevi illo, &c.

Repl and Issue. Et predict' Attorn' pred. Quer' nomine & pro ipso J. D. Magistro suo dic^r, Quod breve suum pred. ratione preallegat' cassari non debet, quia dic^r, Quod idem J. D. superstes est & in plena vita existit, viz. apud (&c.) & non mortuus prout predice' Def. superius allegavit, Et hoc pro eodem J. Magistro suo pet' quod inquiratur per Partiam. Et pred. Def. similis, &c.

Trover and Conversion for Fish, by Tenants in Common, one of them may say, *Pisces suos*, &c.

What shall be intended after Abatement.

And if the Defendant pleads not in Abatement after a Verdict, what may be intended shall be; as in Free Fishing one may say, *Pisces suos*, it may be intended he had them in a Trunk or Pot in the River.

H. Pollexfen.

C H A P.

C H A P. VIII.

*Concerning Issues, Trials, Verdicts,
Judgments, Writs of Error, &c.*

Every Plea, that a man pleadeth, Rules concerning the Issue. ought to be Triable, otherwise the Cause can receive no End, *Co. Lit.*

303.

Every Issue is to be joyn'd in such a Court that hath power to Try it, otherwise the Issue is not well joyned, In what Court the Issue ought to be joyn'd. *Pract. Reg. 165.*

For if the Cause cannot be Tried, the Issue is fruitless.

Every Issue ought to be joyn'd upon How and upon what is ought to be joyn'd. the most Material thing in the Cause depending, That all the Matter in question between the parties may be tried: For else the Trial will prove to little purpose, *Idem p. 176.*

If an Issue be once joyn'd between the Parties, this Issue cannot afterwards be waived, except both Parties do consent unto it, although the Issue is but in Paper, and not Ingrossed in Parchment, *Idem ibid.*

After Special Issue joyn'd, the Parties cannot waive it and plead General Issue, without motion in Court, *1 Keb.*

225.

V 4

An

*Immortal
Issue joyn'd.*

An Immortal Issue joyn'd, that will not bring the Matter in question to be tried, is not helped after Verdict by the Statute of *Jeofails*; but there must be a Repleader; for this is Matter of Substance.

For if there was no Issue, there could be no Verdict, and so it is, as if nothing were done in the Cause.

Pratt. Reg. 167, 241, & 245.

But if an Issue be not well joyned, it is helped. *Idem p. 191.*

*Insufficient
Plea, Issue, and
Verdict.*

If the Defendant plead an Insufficient Plea, and there is a good Issue joyn'd upon that Plea, and a Verdict given upon that Issue for the Defendant; the Plaintiff shall not afterwards take advantage of the Insufficiency of the Plea. For it was his own fault to joyn Issue upon it, when he might have demurr'd upon it. *Idem p. 235.*

*Ill Plea, Issue,
and Verdict.*

So if one plead an ill Plea and the Plaintiff joyns Issue upon this Plea, and a Verdict is thereupon found for the Plaintiff; the Defendant shall not afterwards take advantage of his own ill Plea, to avoid the Plaintiff's Verdict.

Idem p. 239.

An Issue being taken generally referreth to the Count, and not to the Writ. *7 Ed. 3. 34.*

Gene-

General Issue is, when 'tis left to the Jury, Whether the Defendant hath done any such thing as the Plaintiff layeth to his charge. *Kitch. 225. Doct. & Stud. 158.b.*

A Special Issue must be taken in one *Special Issue*, certain material Point, which may be *how to be best understood, and best tried. 20 Ed. 3.*

31. 22 Ed. 4. 28.

Special Issue is, when Special Matter being alledged by the Defendant for his defence, both the parties joyn there-upon.

See *New Book of Entries.*

An Issue shall not be taken upon *No Issue upon a Negative Pregnant*, which implieth *Negative another sufficient Matter, but that which Pregnant.* is single and simple. *21 H. 6. 9.e. 16 E.*

4. 5.

An Issue joyn'd upon an *Absque hoc, Issue upon Travers.* ought to have an Affirmative after it.

Two Affirmatives shall not make an Issue, unless it be left the Issue should not be tried. *Dyer 253. 22 H. 6. 19. 11 H.*

4. 79.

Some Issues be good upon Matter *Issue joyn'd, Affirmative and Negative*, albeit the *though not Affirmative and Negative be not in precisely. precise Words*; as in Debt upon a Lease for Years.

The

The Defendant pleads, That the Plaintiff had nothing at the time of the Lease made.

The Plaintiff replies, That he was seised in Fee, &c.

This is a good Issue, 2 H. 7. 4. 5 H. 7. 12. 26 H. 8. in Formedon.

*What shall
make a good
Issue.*

An Affirmative on the one part, and a Negative on the other part; although it be but an implied Negative, do make a good Issue.

For an implied Negative doth deny what is affirmed, although not so plainly as an express Negative, Pract. Reg. 168.

*Negative Pleas
that admit no
Repl.*

There be Negative Pleas, that be Issue of themselves, whereunto the Defendant or Plaintiff cannot reply, no more than to a General Issue.

*That the Von-
ee had no-
thing, &c.*

As if the Tenant do Vouch, and Defendant Counterplead, That the Vouchee, or any of his Ancestors had anything, &c. whereof he might make a Feoffment, he shall conclude, *Et hoc petit quod inquiratur per Patriam, Et pred. Tenuens similit.*

*That the par-
ties to the Fine
had nothing.
&c.*

So in a Fine pleaded by the Tenant, &c. The Defendant may say, *Quod partes Fines nihil habuerunt, Et hoc petit,* &c.

And

And so in a Writ of Dower, the Tenant pleads, *Nec unques seisi que Dower, Et de hoc pon' se, &c.* 22 H.6.57, 59. 3 H. 7. 7. 9. 12 E. 4. 13.

Where the Issue is joyned of the part *Issue on the* of the Defendant, the Entry is, *Et de Defendant's* *hoc ponit se super Patriam*: But if it be part. of the part of the Plaintiff, the Entry *Issue on the* *Plaintiff's* is, *Et hoc petit quod inquiratur per Pa-* triam, 26 H. 8. 3. Dyer 353.

Note a Diversity, where the Issue *Issue to the* taken goeth to the point of the Writ *point of the* or Action, there *Modo & forma* are but *Writ, &c.* words of Form.

But otherwise it is when a Collateral Point in pleading is traversed:

As if a Feoffment be alledged by *Modo & forma*, two, and this is Traversed *Modo & forma*, and it is found the Feoffment of one, there *Modo & forma* is material.

So if a Feoffment be pleaded by *Collateral Issue* Deed, and it is Traversed *Aliisque hoc quod feoffavit modo & forma*; upon this Collateral Issue *Modo & forma* are so essential, as a Jury cannot find a Feoffment without Deed, 9 H.6.1.40 Ed. 3. 35. 21 Ed. 3. 4, 22. F.N.B. 205, 106.g. 32 H. 8. Issue Bro. 80. 10 E. 4. 2. 12 E. 4. 4.

See Co. Lit. Sect. 483, 484.

Here

Modo & forma, or when but Form, &c. Here is another Diversity to be observed, That albeit the Issue be upon a Collateral Point ; yet, if by finding of part of the Issue it shall appear to the Court, that no such Action lieth for the Plaintiff, no more than if the whole had been found ; there *Modo & forma* are but words of Form. *C. L. 2. libid. 30. E. 4. 7. 8. E. 3. 4. 15. 20. & 21. E. 4. 3. Marlbr. cap. 3. 8. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 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When the Place is Material, the Point in Issue cannot be found in another Place : Where the Place is named but for conformity, Assists may be found in another County : Also in a General Issue, the Jury shall find all material Local things in another County.

*Place material
where the Issue
must be found.*

The Jury by a Mean shall try Local things in another County ; as a Release in a Foreign County , and assists Damages for the Profits of the Land in another County : But in Case of Felony the Trial shall be where the Offence was done : A thing done beyond the Sea shall be tried here , if the foundation of the Action be here. 6 Co. 46. Dowdale's Case 20 Eliz. Dyer 171. 19 Hen. 6. 46. 28 H. 8. Dyer 29. 12 H. 8.1.

Yet the Plea ought not to be made *Issue upon Transitory Action.* part of the Issue in a Transitory Action.

For the Place is not Material , as it is in a Real and Mixt Action. *Pract. Reg. 167.*

Except, as before, in the Case of Officers, &c.

If there be two Issues joyn'd in one Cause, and one of them is a good Issue, joyn'd, one and well joyn'd ; and the other is not good, the other bad. Trial of the Cause entire Damages are given

Judgment to part, Nolle prosequi to part.
given upon both the Issues ; this is erroneous.

For here are Damages given for a Matter which is not rightly tried, for want of joyning a good Issue to bring it in question, *Idem ibid.*

Demurrer to part, Trial to part.
A Judgment may be Entred as to one part of an Issue, and a *Nolle prosequi* to another part of the same Issue.

But this is only where the Issue may be divided, *Pract. Reg. 166.*

Where there is a Demurrer to part of an Issue, and the other part of it remains to be tryed by a Jury, the Trial of it may be either after, or before the Arguing of the Demurrer, at the Election of the Plaintiff. For the Demurrer and the Issue have no dependency one upon the other, *Idem ibid.*

Issue to be tried by Proviso, when.

By the Rules of the Court, if the Plaintiff will not try his Issue after 'tis joyn'd, in such time as he ought by the Course of the Court to do, the Defendant may try it by *Proviso*, if he will, *Idem 166.*

How the Issue must be joyn'd on Penal Statutes.

In joyning Issue upon Penal Statutes *Qui tam*, the Defendant must say, *Non debet dicto Domino Regi & pred' J. qui tam* &c. otherwise it is ill, *Hob. 328.*

An Argument, where the Defendants may either save to themselves the benefit of Defence, upon the General Issue, or plead the Special Matter in Justification.

A Man is allowable in two Cases to plead Specially, where he may plead the General Issue, and give the Special Matter in Evidence.

First, When a Defendant by his Plea doth admit some colour of Action to be in the Plaintiff; but sheweth some Special Matter of Fact to avoid it.

Secondly, Where a man pleads Matter of Law, which admits the Fact, but is not proper for a Jury.

As to the first, see 10 Co. 88. Dr. Leifield's Case; yet there it was said to be an ill Plea, for that Reason of not setting forth the Letters Patents: But if he comes and says *C.* seised in Fee made a Lease to *B.* for Life, and after to *A.* for Life; and *B.* made a Lease for Years to *D.* determinable upon his Life. *B.* dies, *A.* enters; *D.* brings Trespass, and allows a good Title and Cause of Action in *D.* If it were not for this sufficient Matter, in such a Case the Plea is good.

It

It is not indeed a good Title against *A*, because that I shew the Title of *B*, (on whose Title *D*'s Title doth depend) is determin'd; and my Right and Title avoids his. Yet this might have been given in Evidence upon the General Issue; but in regard he gives Colour to the Plaintiffs Action, in that Case it is a good Plea, and not demurable to, as amounting to the General Issue.

This is in Case of an express Colour: For there is Colour express, and Colour implied.

Implied: As if a Man brings an Action of Trespass for taking away so many Sheaves of Corn: The Defendant comes and Justifies, and says, I was Parson or Rector, and these Sheaves were set out for Tithes, and I came and took them. Here needs no former Colour be given, but a very good Colour of Action is implied; for he admits the Sheaves of Corn were the Plaintiffs, and in his possession; but now he sets forth a Right in the Defendant to have them, and take them. The Plaintiff had a Right against all the World, but him, and against him too, if he had not such a Right specially set forth.

And

And so in the Common Case of Maintenance (9 H. 6. fo. 64.) nothing is more common, than to plead the Matter Specially, as that he did it for his Fee, or as a Relation of the Party that sued, or as a Party that had Interest, though no doubt but upon *Ne Maintena pas* pleaded, the Defendant may give it in Evidence.

And so are the Precedents, *Rast. Entr. fo. 429. & Brook Tit. Maintenance N. 17.*

Next, when there is a Matter of Law pleaded, that is not proper for a Jury then, though it amount to a *Not Guilty*, or the General Issue; yet there cannot, for that Cause, be a Demurrer to the Plea: And the Reason is, because that were to perplex the Jury with many Questions and Inquiries, and intricate the Cause, which the Law is against.

A Release is a Bar in Law, yet may be given in Evidence; it may be pleaded without giving any formal Colour, for that it implieth, the Plaintiff might have his Action else; and the Defendant need not intrust a Jury with a Matter of Law, but refer it to the Consideration of the Court.

See *Leyfield's Case.*

So in an Action of Trespass or Trover, for taking away Goods ; the Defendant pleads, *He bought them in Market Overt.* This is a good Plea, because it acknowledgeth, that the Plaintiff had a good Cause of Action ; If it had not been for the Properties, being by Act of Law alter'd and vested in the Defendant.

And a Discharge in Law from the Action, is most natural and proper to lay before the Court, and represent it as a Matter of Law, and not to leave it to *Lay Gents*, to inquire of.

See some Authorities in Point, 21 E.

3. fo. 17. for *Conspiracy*, justifieth as an Indictor ; yet upon *Not Guilty*, this in Evidence would have discharged him.

So 27 Aff. pl. 12. Mo. 600. pl. 828. *Varrell versus Wilson.* A Demurrer, because it amounted to *Not Guilty* ; for the probable Cause was the Gift of the Action, and that answer'd the doing it without probable Cause, and yet held good Plea and Justification.

So 3 Cro. 871. they ought to have the Protection of the Law for what they do according to Law, and the Law justifieth them in what they did.

So

So 3 Cro. 900. it was held a good Chambers Plea, though it amounts to the General *versus* Taylor. Issue.

So 2 Cro. 130. in Error, alledged the Marham *versus* Plea not good; but it was held good *sus Pescod.* Justification, and Plea and Judgment affirmed.

So *Kelway's Rep.* fo. 81. and *Dyer* 285. By the better Opinion in that Book. he justified Specially, though he might have pleaded *Not Guilty*, and the Special Matter would have fetch'd him off: But he would set forth his Legal Justification in his Plea, that he was under the Protection of the Law; and it was held to be sufficient.

See *Bridg.* fo. 130. *Rast. Entr.* 123. Tit.

Conspiracy, a Special Plea.

I have plainly shewn from all these Authorities, where the Defendants have Matter in Law to defend themselves by, from the Plaintiff's Action, they may either save to themselves the benefit of that Defence upon the General Issue, or plead the Special Matter, and it shall be a good Justification in Law.

This was part of an Argument by Mr. Holt, in the Case of the Earl of *Macclesfield* against *Starkey & al'* Gentlemen of the Grand Jury for the County of *Chester*; made to an Objection,

X 2 That

That the Plea amounted to the General Issue.

And thus I have given you the Rules from the Declaration to the Issue, with several other things, not improper for this Treatise.

The next things that follow in course are *Trials, Verdicts, &c.* But these being not immediately to our purpose of Pleading, and treated of at large in particular Books, I shall not insist upon them, but only point out where they are at large.

Concerning Trials, Verdicts, Judgments, and Writs of Error.

Trials and Verdicts.

Concerning *Trials and Verdicts*, there is a Learned Treatise for that purpose, named *Trials per Pais*.

See also much more in *Practical Register*, from p. 308 to 318, and from 334 to 340.

Judgments.

Touching *Judgments* in many Actions, see *Survey of the Law* under the proper Titles.

See *Practical Register*, from p. 168 to 184.

See also *Townsend's two Books of Judgments.*

And

And Note, its said, That when Judgment is given for Security to stay a Trial, if the Party dye before Issue tried, Judgment can never be given on it. 1 Keb. 236.

It was Ordered about Michaelmas Warrant of Term, 2 Jac. 2. That if one be under Arrest, and gives Warrant of Attorney to Confess a Judgment, and no Attorney then present, the Court of Kings-Bench will set the Judgment aside.

And Note also, The Court will never suffer any Judgment by Confession, to be Entred after the Continuance-Day of the same Term of the Acknowledgment; nor by *Nibil dicit, Non sum Informatus*, or otherwise. 2 Keb. 80.

And by the Statute of 29 Car. 2. Every Judgment shall be signed with the Day of the Month and the Year, in which such Judgment was Signed, and the Day of the Month and Year are to be Entred on the Margin of the Plea-Roll; and they shall be accounted Judgments but from that Day wherein they were so Signed, and not from the First Day of the Term, as formerly was used. And the like Rule is for Recognizances.

For the Suing forth Execution, see *Execution Completat Solicitor 173, 174, 175, 176.*

*Errors brought.***Concerning Errors:**

1. In what Court it shall be Addressed.
2. Who shall have the Writ.
3. For the Process, &c.
4. For Assignment of Errors, by whom, at what time, upon what Record, and of what things.
5. For the Bar in Error.
6. For the Judgment in Error, &c.

See *Survey of the Law*, from p. 365 to p. 401.

See also *Practical Register*, from pag. 126. to p. 133.

See likewise *Compleat Solicit.* p. 251, 252, 253, 254, 255, 256.

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F I N I S.

Radcliffe Trustees

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